Supreme Court, U.S.
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No. 03-935

In The Supreme Court of the United States

STATE OF NORTH DAKOTA AND
STATE OF SOUTH DAKOTA,

Petitioners,

v.

LT. COL. K.F. UBBELOHDE, DIST. ENGINEER, OMAHA DIST., U.S. ARMY CORPS OF ENGINEERS; BRIG. GEN. W.T. GRISOLI, COMMANDER, NW DIV., PORTLAND, OR., U.S. ARMY CORPS OF ENGINEERS; STATE OF MISSOURI; AND THE STATE OF NEBRASKA; ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case concerns competing uses of the Missouri River. Uses to which this 2,300-mile river is put include commercial navigation, a myriad of recreational uses, irrigation, municipal drinking water, and nuclear and hydro power generation. There has been a long-standing and divisive dispute between upper and lower basin states over how to properly manage the flow of Missouri River water. In essence, upstream states want water retained in upstream reservoirs to support the recreation industry, while downstream states want water released to support navigation. Recreation in the upper basin is vibrant. Its economic value is many times greater than navigation, which is a declining industry. The United States Corps of Engineers manages the Missouri River under the 1944 Flood Control Act. The Act requires that the Corps equitably balance the uses to which the river is put. The Corps itself has stated that it is obligated to equitably balance uses. The court below, however, ruled that the Act requires that the Corps must generally favor stagnant downstream navigation over thriving upstream recreation. The question presented is:

Whether the 1944 Flood Control Act allows the Corps of Engineers to consistently allocate the water from the Missouri River's upper basin reservoirs to serve downstream navigation at the expense of upstream fish, wildlife and recreation?

RULE 14(1)(b) STATEMENT – LIST OF PARTIES

The following are parties to the proceeding below:

The State of Missouri
The State of Nebraska
The State of North Dakota
The State of South Dakota
The U.S. Corps of Engineers
The MO-ARK Association, a Kansas Non-Profit Association
Ergon Asphalt & Emulsions, Inc.
Magnolia Marine Transport Co.
Blaske Marine, Inc.
Koch Materials Co.
Mid-West Terminal Warehouse Co., Inc.
Tosco, a subsidiary of Phillips 66 Co.
Jebro, Inc.
Memco Barge Line, Inc.

While the following were not parties to the proceeding below, they are parties to ongoing litigation involving the Missouri River's proper management:

Montana Department of Fish, Wildlife & Parks
South Dakota Department of Game, Fish, & Parks
North Dakota Department of Game & Fish
American Rivers
Environmental Defense
National Wildlife Federation
Iowa Wildlife Federation
Kansas Wildlife Federation
Montana Wildlife Federation
Nebraska Wildlife Federation
North Dakota Wildlife Federation
South Dakota Wildlife Federation
Izaak Walton League of America

RULE 14(1)(b) STATEMENT – LIST OF PARTIES – Continued

Mandan, Hidatsa, & Arikara Nation
Missouri River Energy Services, Inc.
Nebraska Public Power Dist.
Coalition to Protect the Missouri River, a Missouri Non-Profit Corporation
ConocoPhillips Co.
Midwest Area River Coalition 2000, a Missouri Non-Profit Association
Missouri River Keepers, an Iowa Non-Profit Corporation
U.S. Department of Interior
U.S. Fish & Wildlife Service

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Lawson, *Dammed Indians: The Pick-Sloan Plan and the Missouri River Sioux, 1944-1980* (1982) 5, 6, 7, 8

Morris, *Unanswered Prayers: The Upper Missouri River Basin States Take on the U.S. Army Corps of Engineers*, 68 N.D. L. Rev. 897 (1992) 7, 9

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PETITION FOR A WRIT OF CERTIORARI

The petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 330 F.3d 1014. App. at 1. The opinion was issued in a consolidated case that reviewed preliminary injunctions issued by three district courts. These injunctions are unreported. App. at 49, 69, 75. The court's order denying North Dakota's petition for rehearing with suggestion for rehearing en banc is unreported. App. at 82. This order also denied the United States Corps of Engineers' petition for rehearing en banc.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 2003. North Dakota's and the Corps of Engineers' petitions for rehearing were denied on September 30, 2003. App. 82. The jurisdiction of this Court is invoked under 25 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the 1944 Flood Control Act, Pub. L. No. 78-534, 58 Stat. 887 (1944), are in the Appendix at 83.

STATEMENT

A. Introduction

"A river . . . offers a necessity of life that must be rationed among those who have power over it." *New Jersey v. New York*, 283 U.S. 336, 342 (1931) (Holmes, J.). This case is about the fair division of Missouri River waters among the seven states through which it flows. It is about whether those states – Montana, North Dakota, and South Dakota – that sacrificed the most to protect the entire basin from floods are to be allowed an appropriate measure of benefit from federal dams and reservoirs – facilities that flooded towns, farms, ranches, and hundreds of thousands of acres of some of the most valuable land in these states.

North and South Dakota were promised, in return for the presence of huge reservoirs within their borders, large irrigation projects. These promises remain unfulfilled. Thus, this case is about whether the benefit these states have themselves largely built, a lake-based recreation industry, will be allowed to develop, or whether the lavish water needs of the small, marginally economic downstream navigation industry, an industry that provides less than 1% of the economic benefits produced by the river, gets priority.

B. Statutory Background

Damaging floods in 1942 and 1943 spurred Congress to consider managing the unruly Missouri River. In 1944 the Corps of Engineers filed with Congress its plan to control the river and develop the basin. H.R. Doc. No. 475, 78th Cong., 2nd Sess. (1944). The primary author was Col. Lewis Pick and so the Corps' plan became known as the

"Pick Plan." A few months later, the Bureau of Reclamation presented Congress with its plan. S. Doc. 191, 78th Cong., 2nd Sess. (1944). The primary author was a Bureau employee, William Sloan. The Bureau's proposal became known as the "Sloan Plan."

The two plans differed. The Pick Plan recommended construction of extensive downstream levees; some tributary dams; and five large dams on the river's main stem. H.R. Doc. No. 475, *supra* at 26-28. The Corps described its proposed reservoirs as "multiple-purpose" facilities, *id.*, and its proposal as "comprehensive," one that would "provide for the most efficient utilization of the waters of the Missouri River Basin for all purposes, including irrigation, navigation, power, domestic and sanitary purposes, wildlife, and recreation." *Id.* at 29. The Bureau of Reclamation's Sloan Plan proposed dozens of smaller dams in the headwaters and on tributaries, and three large dams on the main stem. S. Doc. 191, *supra* at 52-53, 66-67, 78, 95, 118. The Sloan Plan, like the Pick Plan, recommended projects for the comprehensive, multiple use of Missouri River waters, and proposed numerous uses, including "recreation" and "fish and wildlife preservation." *Id.* at 17-18.

Congress thus had before it two different plans from two powerful federal agencies. But fearing that the Missouri's development might be given to a new, independent entity, the Corps and Bureau reconciled their differences, setting forth their agreement in a Joint Report. App. at 93. Their agreement did not sacrifice the objectives of their individual plans. The two agencies "essentially agreed to build all the projects they had proposed." Craig A. Street, *Addressing Missouri's Domestic Conflict of Interests in the Missouri River: A Suggested Approach for Resolution*, 5

Mo. Envtl. L & Pol'y Rev. 117, 126 (1998). Congress accepted the proposed consolidation stating that the "general comprehensive plans" in the two proposals, "as revised and coordinated by" the Joint Report, "are hereby approved." App. at 90.

As stated, the two plans each set forth varied purposes for which the dams would be operated. Included within each articulation of project purposes was wildlife and recreation. *E.g.*, H.R. Doc. 475, *supra* at 29; S. Doc. 191, *supra*, at 13, 17. The Joint Report combined the objectives of both plans and so wildlife and recreation are necessarily included. Indeed, the Joint Report states that the basin's development is to secure benefits for "flood control, irrigation, navigation, power, domestic and sanitary purposes, wildlife, and recreation." App. at 102. The Joint Report and Congress, through its adoption of the Report, did not set priorities among these uses, with one exception. The O'Mahoney-Milliken Amendment provided that upstream consumptive uses, such as appropriations for irrigation and drinking water, have priority over navigation. App. at 85. The Flood Control Act's preamble also instructs that navigation works are to be limited to those that provide "a substantial benefit" and that are "operated consistently with appropriate and economic use of the waters . . . by other users." *Id.* at 83. Other than this priority for upstream consumptive uses over navigation, and the preamble's other limit on navigation, the uses were not ranked or given priorities.

C. Factual Background

After enactment of the 1944 Flood Control Act, five dams were built on the main stem of the Missouri River,

four in South Dakota and one in North Dakota. Montana's Ft. Peck Dam, which had been built earlier under a different statute and primarily to aid navigation, Act of Aug. 30, 1935, ch. 831, 49 Stat. 1028, 1034 (1935), was converted to a multiple-purpose dam. App. at 97.

North Dakota's Lake Sakakawea was formed by construction of Garrison Dam. The lake extends 178 miles, covers 368,000 acres at its normal operating level, and has 1,300 miles of shoreline. *North Dakota v. United States Corps of Engineers,* 264 F.Supp.2d 871, 875 (D.N.D. 2003). Lake Sakakawea holds 32% of the total storage capacity in the Missouri River system. *Id.* South Dakota's Lake Oahe extends 231 miles and has 2,250 miles of shoreline. U.S. Army Corps of Engineers, *Missouri River Revised Draft Environmental Impact Statement Vol. 1: Main Report* 3-134 (Aug. 2001) (hereafter "Revised DEIS"). Oahe provides 31% of the system's storage capacity. *North Dakota v. United States Corps of Engineers,* 270 F.Supp.2d 1115, 1129 (D.N.D. 2003).

Construction of the main stem dams came at a price, and not just a fiscal one. "The reservoirs were built at great cost to the upper Missouri basin states and their inhabitants." Robert E. Beck, *A Book Review of River of Promise, River of Peril: The Politics of Managing the Missouri River,* 1 Great Plains Nat. Resources J. 477, 479 (1996). South Dakota "gave up over 530,000 acres of the most productive and valuable farm land in the state to build the dams and flood the land, all of which was and is designed to protect downstream communities from flooding." App. at 59. North Dakota gave up a similar amount of land. Flooding this land upset "[t]he ecological balance of the entire region, and that of the Dakotas in particular." Michael L. Lawson, *Dammed Indians: The Pick-Sloan*

Plan and the Missouri River Sioux, 1944-1980 194 (1982). "The inundation of precious forests and bottomlands not only eliminated the natural wildlife habitat but also created serious erosion problems." *Id.* Lake Sakakawea cut-banks are eroding at rates as high as 19 feet a year and on Lake Oahe as high as 23 feet a year. *Revised DEIS* at 3-22. Tribal governments describe the erosion as "'extensive.'" *Id.* Thus, the loss of agricultural land in the upper basin continues and unstable banks have led to the loss of sacred and cultural sites. *See, e.g., Yankton Sioux Tribe v. U.S. Army Corps of Engineers*, 194 F.Supp.2d 977, 983 (D.S.D. 2002).

The downstream states have been well served by the Act's flood control benefits, but the attempt to sustain a viable navigation industry downstream has failed. According to two scholars, despite the fact that the government built an "expensive" nine-foot channel in the lower basin and continually maintains it, navigation, which requires "lavish amounts of water, [has] not developed into an enterprise of noticeable size or need." John H. Davidson & Thomas Earl Geu, *The Missouri River and Adaptive Management: Protecting Ecological Function and Legal Process*, 80 Neb. L. Rev. 816, 836 (2001). The industry is presently worth only $7 million annually, *e.g., American Rivers v. United States Army Corps of Engineers*, 271 F.Supp.2d 230, 261 (D.D.C. 2003); App. at 59; *Revised DEIS at 5-125*, and maybe as little as $1 million. *North Dakota,* 270 F.Supp.2d at 1129. Navigation delivers less than 1% of the overall economic benefits produced by the river. *Revised DEIS* at 5-131. As the South Dakota District Court found, downstream navigation has been declining for some time, "will continue to decline greatly, and is of little, if any, net economic value on the Missouri River."

App. at 59. Navigation tonnage peaked in 1977 at 3.3 million tons. *Revised DIES* at 3-145. By 1990 and 2000 the volume had slipped to 1.3 million tons. *Id.* at 3-146. Grain shipments fell 81% from the peak of 1.95 million tons in 1964 to just 0.37 tons in 2000. C. Philip Baumel & Jerry Van Der Kamp, *Past and Future Grain Traffic on the Missouri River* 1 (Inst. for Ag. & Trade Policy, July 2003). The small volume of Missouri River commerce is apparent when compared to other rivers. Mississippi barges carry over 380 million tons per year and the Ohio River moves at least 150 million tons. Brian Morris, *Unanswered Prayers: The Upper Missouri River Basin States Take on the U.S. Army Corps of Engineers*, 68 N.D. L. Rev. 897, 915 (1992). Unsurprisingly, commentators describe downstream navigation as "moribund," "an experiment that has failed," and "the army's bad joke." *Id.* at 935; Davidson & Geu, *supra*, at 836; Lawson, *supra*, at 187. A district court below described it as "rather meager." App. at 59.

For their sacrifices, the upper basin states were to receive massive irrigation projects. *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 508 (1988). This promise has remained unfulfilled. While most of the water in South Dakota's Lake Oahe was projected to be used for irrigation, "none of this water has been allotted for irrigation, no works have been constructed to make use of this water for irrigation, and none of this water has ever been used for irrigation or is likely to be used for that purpose in the foreseeable future." *Id.* at 509 n.5. *See also* App. at 60 (the promised irrigation of South Dakota's James River Valley, "an idea that primarily drove the Pick-Sloan Plan, never materialized"). Indeed, "South Dakota has received rather little from the dams and has given up much." App. at 60.

The story of unfulfilled irrigation promises is the same in North Dakota. *E.g.*, Street, *supra*, at 127.

> North Dakota sacrificed hundreds of thousands of acres, much of it prime river bottomland, for the greater benefit of the nation. In return, the Federal Government promised assistance in replacement of the economic base of the State and Indian Tribes. There is evidence that this has not taken place.

Garrison Diversion Unit Comm'n, *Final Report* i (Dec. 20, 1984). Without question, "the upper basin states and . . . tribes have been short-changed in the management of the Missouri River and something should be done about it." Beck, *supra*, at 490.

Of all the benefits Pick-Sloan promised, the "most immediate and successful" have been upstream recreation and tourism. Lawson, *supra*, at 188. Vacationers come to the upstream reservoirs to swim, boat, camp, and picnic. *Id; Revised DEIS* at 3-127. The primary attraction of the reservoirs, however, is fishing. The reservoirs are fishing destinations for tens of thousands of local and out-of-state fishermen in search of trophy walleye. The upstream reservoirs are national and world class sport fisheries. *North Dakota,* 270 F.Supp.2d at 1129, 1130. South Dakota's Lake Oahe may be "the greatest [w]alleye fishery in the United States." App. at 50. Anglers in turn support local hotels, bait and boat shops, marinas, and businesses near and on the road to the reservoirs. "Businesses catering to tourists and outdoor enthusiasts have thrived." Lawson, *supra*, at 188.

The economic value provided by Missouri River recreation is exceptional, even though it has not attained

its full potential. South Dakota's Missouri River fishing industry is worth $51 million a year. App. at 50; *North Dakota*, 270 F.Supp.2d at 1130. Lake Oahe fishing alone produces revenues of about $20 million a year. App. at 38. North Dakota has calculated the benefits of its fishing and tourism industry at about $65 million a year, with the value of the Lake Sakakawea fishery alone being at least $23 million a year. *North Dakota v. Corps,* 270 F.Supp.2d at 1129. In sum, the competition for Missouri River water is between the lower basin's stagnant, localized navigation industry and the upper basin's "growing recreation industry." Morris, *supra,* at 898.

The allure of trophy walleye drives upstream recreation. But the walleye cannot survive without its primary food source, the rainbow smelt. The smelt spawn occurs each spring when the smelt lay their eggs within about six inches of the surface. App. at 40. If the water recedes the eggs will die after a few minutes of exposure to the air. *Id.* Thus, a successful smelt spawn requires a stable or rising water level. *Id.* The Corps in 2002, as it had many times before, threatened to sacrifice upstream fisheries by destroying the smelt to satisfy the demands of the dwindling navigation industry. This threat triggered the litigation now before this Court.

D. District Court Decisions

South Dakota biologists were anticipating an excellent smelt spawn in the spring of 2002. This was after several years in which the smelt population had been "greatly reduced . . . thus starving the walleye population." App. at 49. The reduced smelt population was caused in part by the Corps' "great flushes of water," which forced the smelt

through the Oahe Dam's turbines. *Id.* To protect the spawn, South Dakota needed a few weeks of stable water. The Corps, however, wanted to release more water from South Dakota reservoirs than was flowing in. The effect of the loss of the smelt spawn on the walleye would have been devastating to South Dakota and the businesses and communities that depend on the fisheries. *Id.* at 42-43, 54. "Destruction of the fisheries would deprive South Dakota of the remaining benefit from having over a half million of its acres flooded and forever lost." *Id.* at 60.

To protect its smelt spawn, South Dakota obtained a restraining order and later a preliminary injunction prohibiting the Corps from drawing down two reservoirs. *Id.* at 35. Because the injunction was designed to protect only the spring smelt spawn, it was set to expire on May 25, 2002. *Id.* at 62-63. In response to the South Dakota injunction, the Corps announced plans to immediately draw down North Dakota's Lake Sakakawea and Montana's Ft. Peck Reservoir. This stirred these two states to obtain injunctions to protect their fisheries. *Id.* at 64, 69, 72. Because the purpose of these injunctions was to protect the 2002 smelt spawn, they too were of short duration. North Dakota's was to expire on May 25th and Montana's on the 23rd. *Id.* at 71, 73-74.

Nebraska, after being denied intervention in South Dakota's suit, filed an action in the District of Nebraska, into which Missouri intervened. The Nebraska District Court injunction ordered the Corps to comply with its *Missouri River Master Manual*. *Id.* at 75. The *Master*

Manual guides the Corps' river management.[1] Faced with these injunctions, the Corps appealed. The Eighth Circuit promptly stayed the North Dakota, South Dakota, and Nebraska injunctions. (The Court of Appeals did not address the Montana order. Montana is in the Ninth Circuit).

E. Other Missouri River Litigation

While the Corps' appeal was pending, there was no activity in the underlying actions, though Montana voluntarily dismissed its suit in June of 2002. But with the drought continuing into its fourth year, three new suits were filed in 2003. Private downstream interests sued the Corps, the U.S. Fish & Wildlife Service, and the Montana, North Dakota, and South Dakota game and fish departments. First Amended Complaint, *Blaske Marine, Inc., et al. v. Norton, et al.*, No. 8:03CV142 (D. Neb. Apr. 14, 2003). The plaintiffs assert, in part, that walleye stocking programs in the upper basin adversely affect the Missouri River's pallid sturgeon, an endangered species. They also challenge agency decisions made under the Endangered Species Act ("ESA"), NEPA, the 1944 Flood Control Act, and other federal laws.

Also in the spring of 2003, North Dakota again sued the Corps, but on a theory different than its 2002 suit. The state contends that the ongoing draw down of Lake Sakakawea is removing so much water that the lake's cold

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[1] The *Master Manual*, which is supplemented with an Annual Operating Plan, was last revised in 1979. In 1989 the Corps recognized the *Manual* as out-of-date and in need of revision. Since 1989 it has been working on issuing a new *Manual*. App. at 6.

water habitat is in jeopardy. Complaint, *North Dakota, et al. v. United States Corps of Engineers, et al.*, No. A1-03-050 (D.N.D. Apr. 29, 2003). The Corps' actions, North Dakota contends, violate water quality standards North Dakota adopted for Lake Sakakawea under the federal Clean Water Act, and that these violations will lead to the loss of the lake's cold water habitat, endangering the health of the walleye and salmon.

Environmental groups also filed suit in 2003. First Amended & Supp. Complaint, *American Rivers, et al. v. United States Corps of Engineers, et al.*, No. 1:03CV00241 (D.D.C. May 8, 2003). This suit asserts that the Corps and Fish & Wildlife Service violated the ESA by failing to protect two Missouri River shore birds, the threatened piping plover and the endangered least tern, as well as the river's endangered pallid sturgeon. In 2000 the Fish & Wildlife Service had issued a biological opinion under the ESA that concluded that the Corps' river operations jeopardize endangered and threatened species. To avoid ESA violations, the biological opinion called for implementing a new regime of low summer flows by 2003. When the Corps' proposed 2003 operating plan did not include low summer flows, the environment groups sued.

Thus, there are six suits pending over the Corps' river management, that is, the South Dakota, Nebraska, and North Dakota 2002 suits, and the North Dakota, Blaske Marine, and American Rivers 2003 suits. The litigation was consolidated in the District of Minnesota. *In re Operation of the Missouri River System Litigation*, 277 F.Supp.2d 1378 (J.P.M.L. 2003). And on June 4, 2003, the Eighth Circuit issued an important decision in the dispute.

F. The Court of Appeals' Decision

The court below rejected the Corps' argument that its river operations are not subject to judicial review. It ruled that while the Corps has "a good deal of discretion" under the 1944 Flood Control Act to manage the river, its "discretion is not unconstrained." App. at 21. The Act sets forth a number of functions for the river system and the Corps has a duty to balance them. *Id.* The Corps' *Master Manual* also provides law needed for judicial review. *Id.* at 26.

After deciding that the Corps' actions are reviewable, the court below considered the propriety of the preliminary injunctions. It began its review of the 1944 Flood Control Act by citing *ETSI Pipeline Project,* 484 U.S. 495 (1988), for the proposition that the Act's "dominant functions" are flood control and maintaining downstream navigation. App. at 5. *See also id.* at 21, 32. It then reviewed the Corps' *Master Manual.*

Section 9-3 of the *Manual* contains a numbered list of six uses for which the system is to be operated. *Id.* at 23. The list "calls for sequential consideration" of the uses. App. at 6. *See also id.* at 32. In other words, since flood control is listed first, it is the pre-eminent purpose for which the river is to be managed, and since in this list navigation appears fourth and recreation sixth, the court ruled that navigation trumps recreation. *Id.* This interpretation of Section 9-3 was particularly important in light of the ruling that the *Master Manual* is binding. *Id.* at 22. Based on its interpretation of the *Master Manual* and Flood Control Act, the court below ruled that the injunctions issued by the North Dakota and South Dakota District Courts, even though they expired in late May of

2002 when the smelt spawn was complete, were improperly issued because they adversely affected navigation. *Id.* at 33-34. It ruled that the Nebraska District Court's injunction was proper because it ordered compliance with the *Master Manual*.

REASONS FOR GRANTING THE PETITION

Introduction

The decision below should be reviewed because it is inconsistent with the 1944 Flood Control Act, in which Congress directed that the river's reservoirs be managed as multi-purpose facilities, serving a number of interests, and with flexibility that adjusts to the basin's changing circumstances. Congress did not intend the river to be managed to favor a marginal $1 to $7 million a year navigation industry over a thriving recreation industry with a much greater economic value. Further, the Corps of Engineers, the agency responsible for administering the Flood Control Act, does not interpret the Act as giving navigation priority. The court below, however, failed to consider and respect this agency understanding.

This case creates a particularly strong claim on the Court's attention because the decision of the court below vests pervasive power over life in the basin with the federal government and, in particular, with the military. The impact on the basin from the government's construction and operation of the reservoirs has been, and will continue to be, immense. Towns were wiped out to allow for the permanent flood of the reservoirs, economies were disrupted, and ecologies turned upside down. Flood control protected downstream and upstream areas, and allowed

certain areas to flourish in safety. Downstream economies sought to capitalize on the heavily subsidized navigation allowed under the Act, but navigation has been in economic doldrums for decades. The upstream states likewise never enjoyed the economic boom anticipated from the proposed federal irrigation projects. The projects fell victim to political and other attacks. The upstream states did, however, invest in and develop fisheries and recreational facilities that have become vital to their economies. The magnitude of the federal impact alone merits this Court's attention.

Moreover, special attention is appropriate because the court below essentially held that Congress entrusted the Missouri River Basin's cultural, political, social, and economic development to the military. North and South Dakota have great respect for the military and are among the leaders in sending their youth into military service. The duties entrusted to the Army under the 1944 Flood Control Act are not, however, military duties, nor are they duties commonly entrusted to a branch of the military concerned with engineering problems. The duties here concern the day-to-day balancing of civilian political, social, and economic interests. It is appropriate that this Court extend its scrutiny to this case to ensure that the military adheres to Congressional standards in what is essentially a civilian dispute.

THE DECISION BELOW MISINTERPRETED THE 1944 FLOOD CONTROL ACT AND, CONSEQUENTLY, FAILED TO ACCORD RECREATION ITS PROPER ROLE IN MANAGING THE MISSOURI RIVER'S MULTI-PURPOSE FACILITIES

The 1944 Flood Control Act governs Missouri River operations. The Act, as discussed, not only had its origins

in but incorporates the Corps' and the Bureau's opposing plans, as reconciled in the Joint Report. App. at 90. The Joint Report, as well as the plans themselves, make it clear that recreation, at the minimum, is entitled to parity with other uses. The Flood Control Act itself contains provisions supporting this conclusion.

A. The 1944 Flood Control Act

The Flood Control Act's preamble sets forth several propositions that guide the Act's application. It expresses congressional policy recognizing state interests and rights "in determining the development of the watersheds within their borders." App. at 83. It recognizes a state's "interests and rights in water utilization and control" to protect to "the fullest possible extent established and potential uses." *Id.* The preamble expresses a congressional policy that seeks "comprehensive" development. *Id.* Thus, the preamble proclaims that a state's interests in its water resources are not to be compromised. If the decision below stands, the basin's comprehensive development will be hindered and the primary interest that North and South Dakota have in the Missouri River – its usefulness as a recreation resource – will be compromised.

Perhaps of greater significance is the preamble's instruction that navigation works are to be limited to those that provide "a substantial benefit" and that are "operated consistently with appropriate and economic use of the waters . . . by other users." *Id.* Navigation does not provide a substantial benefit to the basin. It provides less than 1% of the system's economic benefit, *Revised DEIS*, *supra* at 5-131, and favoring it hinders other appropriate and more economic uses.

Section 4 of the Act reveals that Congress had recreation in mind. The section authorizes the construction and maintenance of recreation facilities in reservoir areas and adds: "The water areas of all such reservoirs shall be open to public use . . . for boating, swimming, bathing, fishing, and other recreational purposes." App. at 87. *See also South Dakota v. Bourland,* 508 U.S. 679, 688-90 (1993). The water is open "without charge" and "ready access" to it shall be maintained. App. at 87. No use may be permitted that is inconsistent with state "laws for the protection of fish and game." *Id.* at 88. Section 4 creates recreation as an authorized project purpose and indicates that deference is to be given to the state's use of the areas for fish and recreation purposes. While the court below properly noted that the Act recognizes numerous uses, *id.* at 5-6, the Act itself contains neither language about primary or secondary uses, nor anything suggesting a ranking of uses.

B. The Joint Report

The Flood Control Act approved the Pick Plan and Sloan Plan, "as revised and coordinated" by the Joint Report. App. at 90. The Joint Report contains critical direction about the uses to which the facilities would be put. It states that development of the basin in accordance with the two plans, "as coordinated in the enclosed joint engineering report . . . will secure the maximum benefits for flood control, irrigation, navigation, power, domestic and sanitary purposes, wildlife, and recreation." App. at 102. Thus, recreation and wildlife are expressly included. Equally important, the Report does not contain a list of priorities. There is no division of uses into first class and second class; primary and secondary. Because the Joint Report, which Congress adopted through the Flood Control

Act, includes recreation as an authorized use and does not provide a list of priorities, the decision below merits review.

C. The Pick Plan (Doc. 475) and the Sloan Plan (Doc. 191)

The plans adopted by the Flood Control Act contain not only the plans, but additional comments from the Corps and Bureau as well as other agencies. They refer to recreation as an authorized use, the need for the basin's comprehensive development (which necessarily requires equitable consideration for all uses), and the need for flexible management to adjust operations when circumstances change.

1. The Pick Plan. The Pick Plan includes numerous descriptions of the proposed facilities and uses as "multiple-purpose." *E.g.*, H.R. Doc. 475, *supra*, at 1, 4, 18, 26, 30. There are even references to "maximum" multiple-purpose use. *Id.* at 3. The Pick Plan states an intent to develop a comprehensive project, the benefits of which will flow broadly throughout the basin. The Corps' Chief Engineer stated that all federal agencies reviewing the plan "agree that the maximum feasible multiple-purpose use of water and the broadest economic program of reservoirs for that type of use are the primary principles on which the planned development . . . of the Missouri River Valley should be based." *Id.* The plan "establishes a broad framework for comprehensive basin-wide improvements." *Id.* at 4. The plan's benefits "will be very great and widespread." *Id.* at 18. Expressly included among the Pick Plan's purposes were "wildlife" and "recreation." In addition to flood control benefits the plan also provides for the

most efficient use of Missouri River waters "for all purposes, including . . . wildlife, and recreation." *Id.* at 28-29.

An important characteristic of the Corps' plan was its flexibility. Document 475 includes the Department of Agriculture's statement of its understanding of the plan as "not necessarily final, but a framework around which the ultimate basin-wide plan can progressively be developed, with full recognition given to the best utilization of the waters . . . in accordance with the multiple-purpose principle." *Id.* at 12. The Corps' Chief Engineer commented on the plan's evolving nature. "Due allowances must be made for any changed conditions that may arise in the future. . . . The adjustment of water use to meet the changing needs of the Missouri Basin as a whole can and will be made." *Id.* at 3. "[S]teps can be taken to meet new economic situations that may arise." *Id.* The plan is "flexible" and provides "sufficient latitude to permit such modifications thereof and changes therein as may be found advisable." *Id.* at 4.

This flexibility is crucial for ordering present-day uses. While recreation was among the authorized uses, it did not always have the economic importance it does today. But now that the upstream states have developed their reservoirs into superior fisheries and recreational facilities, the Pick Plan's flexibility, and therefore the Flood Control Act's flexibility, must be implemented. In presenting the Pick Plan to Congress, the Chief Engineer stated that "preference can be given to the functions which contribute most significantly to the welfare and livelihood of the people of various parts of the basin." *Id.* at 3. The court below turned this on its head. It gives a preference to the function, navigation, that of *all* the Act's purposes

contributes the least to the basin's welfare and livelihood. *Revised DEIS, supra* at 5-131.

2. The Sloan Plan. Interior Secretary Ickes stated that his agency's Sloan Plan "contemplates utilization of the waters of the Missouri River beneficially for multiple purposes in the stabilization of the agriculture and economy of this vast basin." S. Doc. 191, *supra*, at 1. He added that "[s]ubstantial and material benefits would accrue through recreational use of the waters and facilities proposed; through their use in fish and wildlife conservation." *Id.* at 2. The Department of Interior's Board of Review described the Sloan Plan as a "comprehensive plan" for, among other things, the "recreational use of waters, conservation of fish and wildlife, and pollution abatement." *Id.* at 10. The Sloan Plan itself states:

> Every water resource and all feasible beneficial uses of water, such as aids to navigation, flood control . . . fish and wildlife preservation, and recreation, were taken into account in an effort to formulate a basin-wide plan most likely to yield the greatest good to the greatest number of people.

Id. at 17.

Significantly, the Sloan Plan, like the Pick Plan, was intended as flexible. It could be modified as "changes in physical and economic conditions make necessary." *Id.* And times do and have changed. For example, the 1979 *Master Manual* that the Corps uses to manage the river is outdated and requires revision, as the Corps acknowledges. *E.g., Revised DEIS* at 1-1, 1-3.

Any doubt that the Department of the Interior and its Bureau of Reclamation contemplated a broad program for

the basin and included recreation in their vision, is dispelled by the letter written by the Bureau's Commissioner and included in Document 475. The Commissioner, in commenting on the Pick Plan, stated that certain principles must govern the river's management. One of those principles is that the project must include "a wide variety of functions, including . . . fish and wildlife preservation and recreation." H.R. Doc. 475, *supra* at 6. The Commissioner added that the reservoirs "should be operated to obtain the maximum benefits . . . for fish and wildlife preservation, [and] recreation." *Id.* at 7. He stated that where the uses conflict, "preference should be given to functions which contribute most significantly to the welfare and livelihood of the largest number of people." *Id.* at 7.

D. Agency Interpretation of the Flood Control Act

The statement by the court below that the Corps has a duty to generally prefer navigation over recreation is surprising because not even the Corps takes that extreme position. The Corps has repeatedly stated that the 1944 Flood Control Act does *not* give navigation priority over recreation.

In a brief to the court below the Corps stated: "There is no statement in the Act . . . that navigation is always entitled to a priority over the needs of fish and wildlife." Consol. Reply Brf. of Fed. Defendants-Appellants at 10 (undated). Not only is the Act silent about priorities so too, the Corps added, is the legislative history. "The purposes identified in the legislative history, are not specifically identified as primary or secondary purposes and are not

prioritized in importance by Congress." *Id.* at 1. *See also id.* at 8-9. "[W]ith the exception of flood control, none of the purposes of the System automatically takes precedence over the other purposes." *Id.* at 6. In another brief to the court below the Corps stated that the Pick and Sloan Plans identify broad objectives, "listing among other goals, flood control, irrigation, navigation, power, wildlife, and recreation." Consol. Brf. of Fed. Defendants-Appellants at 24 (undated). At oral argument before the court below, the Corps' attorney was asked, "[are] navigation and recreation equal or is navigation higher?" He answered: "Our view of it is that it should be equal, that we should try to support the navigation season and we should try to support recreation."

In 1992 the Department of Justice wrote North Dakota: "Congress did not assign a priority to these [project] purposes." Letter from B.H. Hartman, Acting Asst. Att'y Gen. Env't & Nat. Res. Div., Dep't of Justice, to N.J. Spaeth, N.D. Att'y Gen. (Mar. 10, 1992). Rather, "it was contemplated that the Corps . . . would balance these functions in order to obtain the optimum development and utilization of the water resources of the Missouri River Basin to best serve the needs of the people." *Id.*

Corps officials have stated under oath that all project purposes should receive equal consideration. Depo. of J.P. Elmore, Chf. of Operations, Const. & Readiness, U.S. Corps of Engineers at 34-42, *South Dakota, et al. v. Bornhoft, et al.,* No. CV-91-26 (D. Mont. July 14, 1992). In 1993 testimony the Corps' Col. Schaufelberger stated that "nothing in the law" gives preference to navigation over recreation. *Hrg. Before the Comm. on Env't & Pub. Works* (Oct. 1, 1993, Glendive, Mont.) (reprinted in 141 Cong. Rec. S3744-04, at S3755 (1995)). The Colonel added:

> [T]he law does not discriminate. The law says in the purpose of the reservoirs . . . there is no priority established. So there is nothing in the law that says there has to be one priority over the other. The only priority established in the law is the O'Mahoney-Milliken amendment, which specified that consumptive use has priority over other purposes. That's the only priority that I'm aware of that is specified by law.

Id. At a public meeting the Corps' Gen. Witherspoon stated that while flood control is given priority, "[a]fter that we don't have a set order or priorities." *Corps of Engineers Pub. Mtg. on Missouri River Master Water Control Manual Rev. & Update,* Trans. at 38 (June 18, 1990, Council Bluffs, Iowa).

Thus, the Corps has often and consistently stated that navigation does not take precedence over recreation. Its statements are considered and authoritative, and have been made by key Corps officials as well as the Department of Justice. This Court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron, USA, Inc. v. Natural Res. Def. Council,* 467 U.S. 737, 844 (1984). The degree of deference may vary with the circumstances. *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001). Useful considerations are the degree of the agency's care, consistency, formality, and expertness, and the persuasiveness of the agency position. *Id. See also Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944).

The Corps' statements have been consistent. They have been made in formal settings, such as congressional and judicial hearings, and clearly upon careful, not cursory

thought. And the statements are persuasive, as indicated by the Government Accounting Office's independent analysis of the governing law. Its analysis "did not reveal a statutory scheme for regarding project purposes . . . as primary or secondary." U.S. Gen. Accounting Office, *Water Resources, Corps Management of Ongoing Drought in the Missouri River Basin* 33 (Jan. 1992).

E. The Actions of the Corps Belie its Words, Leading to the Present Controversy

As noted above, this litigation was precipitated by the Corps' actions in the spring of 2002, actions that challenged plans of state biologists. Since the closing of the Oahe Dam in 1958 South Dakota has worked hard to turn Lake Oahe into a nationally known, trophy walleye destination. In 1997, however, the Corps flushed from the reservoir a half a billion rainbow smelt, the forage fish that support the walleye. App. at 38. This action, combined with others, produced a crisis in the walleye. The South Dakota District Court found that Lake Oahe had become "full of hungry, stunted walleyes in poor condition." *Id.* at 39. In the spring of 2002, South Dakota's biologists informed the Corps that conditions were near ideal for recovery of the forage fish population; all that was needed to protect the smelt eggs was a stable or rising water level in Lake Oahe for a limited period. *Id.* at 8. Nonetheless, the Corps announced its intention to drop Lake Oahe's water level approximately two feet from mid-April to mid-May. This action would have destroyed most of Oahe's smelt eggs; the eggs would have dried out and died.

The South Dakota District Court thus, after hearings, issued both a TRO and preliminary injunction. The court

carefully considered the question of how the Corps had historically, and recently, preferred downstream navigation over upstream fish and recreation. It also had before it "very persuasive and detailed" evidence showing "the rather meager, if any, economic impact downstream navigation produces." *Id.* at 59. In 1960 the Corps predicted commercial traffic would increase to five million tons by 1980. Baumel & Van Der Kamp, *supra* at 1. It peaked at 3.3 million tons in 1977 and ever since had been in precipitous decline. *Revised DEIS* at 3-145, 3-146.

The District Court concluded that the Corps does not give recreation interests proper consideration. "Whenever a water shortage occurs, it is the Corps' practice to require all or some of the upstream states . . . to 'take the hit.'" App. at 58. "[I]t is clear from the evidence that the Corps, in times of low water . . . always chooses to seriously impact upstream states to continue navigation, 'come Hell or low water.' The more dire the water conditions upstream, the more water that is released for downstream purposes." *Id.* Even when the upstream states make a "modest" request, "the Corps refuses to abide or even properly consider such requests." *Id.*

F. The Court of Appeals erred in its evaluation of the applicable law.

The critical conclusion of the court below was that the 1944 Flood Control Act obligates the Corps to give priority to flood control and navigation. But as discussed above, (a) the Act's text does not support this conclusion, (b) the Corps' pronouncements before courts and elsewhere repudiate this conclusion, (c) the GAO evaluation does not support it, and (d) putting this conclusion into practice

gravely harms recreation, fish, and wildlife interests, to the benefit of inconsequential navigation. The source of the error below was the court's misreading of Supreme Court precedent. This Court has twice considered the 1944 Flood Control Act. Its most recent examination was in *South Dakota v. Bourland*, 508 U.S. 679 (1993), in which the Court reviewed the Act's recreation, fish, and wildlife provisions, and determined that the state had exclusive fish and wildlife jurisdiction over non-Indians on Missouri River waters and on Corps' land adjoining the reservoirs.

While the court below did not mention *Bourland*, it cited *ETSI Pipeline Project v. Missouri*, 484 U.S. 495 (1988), to support its view that the 1944 Flood Control Act's "dominant functions" are flood control and navigation. App. at 5, 21, 32. *ETSI*, however, concerned a contract signed by the Secretary of the Interior allowing a private company to withdraw water from Lake Oahe for use in a slurry pipeline to transport coal from Wyoming to the southeastern United States. *ETSI*, 484 U.S. at 497-98. Downstream states challenged the Secretary's authority to enter the contract without the Corps' approval. Thus, the case was about the division of authority between the Corps and Interior. *Id.* at 499. It did not involve an upstream-downstream dispute over rationing water, or over priorities.

The Court ruled that the Secretary did not have unilateral authority to authorize the withdrawal. *Id.* at 513-17. It found explicit language in the Flood Control Act supporting this conclusion. Because the Act "speaks directly to the dispute . . . [t]hat is 'the end of the matter.'" *Id.* at 517. And that is where the court below should have left *ETSI*; as a decision addressing the jurisdiction of federal agencies over a water withdrawal. *ETSI* should not

have been used by the court below as the springboard to decide an entirely different issue, that is, whether the Corps, in operating the river, must favor navigation over recreation.

The court below erred in finding that *ETSI* had ruled that navigation was a "dominant function" of the reservoirs. App. at 5, 21, 32. While the "dominant function" language does appear in *ETSI,* 484 U.S. at 512, it was used in the context of discussing only one of the plans offered to Congress – the Sloan Plan. *Id.* The 1944 Flood Control Act was, as established above, a combination of all the Sloan Plan and Pick Plan components. The Pick Plan, as described in *ETSI*, 484 U.S. at 500, expressly included "wildlife" and "recreation." The Flood Control Act itself approved the "general comprehensive plans set forth in [the Pick and Sloan Plans] as revised and coordinated by Senate Document 247." *Id.* at 502. The Sloan Plan thus could not be accurately cited to set out "dominant functions," because it was only part of the plan ultimately adopted in the Act. The court below erred in its heavy reliance on *ETSI's* Sloan Plan citation, *see* App. at 5, 21, 32, while ignoring *ETSI's* reference to the Pick Plan and its inclusion of "wildlife" and "recreation." *ETSI*, 484 U.S. at 500.

This Court is thus respectfully requested to authoritatively define what priorities bind the Corps of Engineers and the degree of flexibility that it has in applying those priorities. North and South Dakota urge that undertaking this task is appropriate because of the inconsistencies in words and actions of the military officers who operate the reservoirs. Further, the very nature of the arrangement created by Congress calls for judicial supervision of military officers performing functions so vital to the daily lives

of millions of citizens throughout the Missouri River Basin.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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330 F.3d 1014

United States Court of Appeals,
Eighth Circuit.

State of SOUTH DAKOTA, and William J. Janklow, Governor, Plaintiffs - Appellees,
v.
Lt. Colonel Kurt F. UBBELOHDE, District Engineer, Omaha District, United States Army Corps of Engineers, and General David A. Fastabend, Commander, NW Division, Portland, Oregon, Defendants,
MO-ARK Association, formerly known as Missouri-Arkansas River Basins Association, Movant - Appellant.
State of South Dakota, and William J. Janklow, Governor, Plaintiffs - Appellees,
v.
Lt. Colonel Kurt F. Ubbelohde, District Engineer, Omaha District, United States Army Corps of Engineers, and General David A. Fastabend, Commander, NW Division, Portland, Oregon, Defendants,
Ergon Asphalt and Emulsions, Inc.; Magnolia Marine Transport Company; Blaske Marine, Inc.; Koch Materials Company; Mid-West Terminal Warehouse Company, Inc.; Tosco, a subsidiary of Phillips 66 Company; Jebro, Incorporated, and Memco Barge Line, Inc., Movants - Appellants.
State of South Dakota, and William J. Janklow, Governor, Plaintiffs - Appellees,
v.
Lt. Colonel Kurt F. Ubbelohde, District Engineer, Omaha District, United States Army Corps of Engineers, and General David A. Fastabend, Commander, NW Division, Portland, Oregon, Defendants,

State of Nebraska, Movant - Appellant.
State of South Dakota, and William J. Janklow,
Governor, Plaintiffs - Appellees,
v.
Lt. Colonel Kurt F. Ubbelohde, District Engineer,
Omaha District, United States
Army Corps of Engineers, and General David A.
Fastabend, Commander, NW
Division, Portland, Oregon, Defendants - Appellants.
State of Nebraska, also known as Don Stenberg,
Attorney General of the State of
Nebraska, ex rel., Plaintiff - Appellee,
v.
State of Missouri, Intervener Below - Intervener on Appeal,
Kurt F. Ubbelohde, Lt. Colonel, District Engineer,
Omaha District, United States Army Corps of Engineers,
and General David A. Fastabend, Commander, NW
Division, Portland, Oregon, Defendants - Appellants,
State of Iowa, Amicus on Behalf of Appellee.
State of North Dakota, and John Hoeven,
Governor, Plaintiffs - Appellees,
v.
Lt. Colonel Kurt F. Ubbelohde, District Engineer,
Omaha District, United States Army Corps of Engineers,
and General David A. Fastabend, Commander, NW
Division, Portland, Oregon,Defendants - Appellants.
State of Missouri, Intervener on Appeal.

Nos. 02-2133SD, 02-2144SD, 02-2185SD,
02-2187SD, 02-2191NE and 02-2305ND.

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Rehearing and Rehearing En Banc Denied Sept. 30, 2003.*

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* Judge Bye would grant the petitions for rehearing en banc.

Robert J. Vincze, argued, Denver, CO, for appellant in No. 02-2133.

John P. Guhin, argued, Pierre, SD, for appellee in Nos. 02-2133, 02-2144, 02-2185 and 02-2187.

Mark F. Marshall, argued, Sioux Falls, SD, for appellant in No. 02-2144.

Jon C. Bruning, argued, Lincoln, NE, for appellant in No. 02-2185.

Robert H. Oakley, argued, Washington, DC, for appellant in Nos. 02-2187, 02-2191 and 02-2305.

William J. Bryan, argued, Jefferson City, MO, for intervenor in No. 02-2191.

Charles M. Carvell, argued, Bismarck, ND, for appellee in No. 02-2305.

Before WOLLMAN, RICHARD S. ARNOLD, and MELLOY, Circuit Judges.

RICHARD S. ARNOLD, Circuit Judge.

This case arises out of the management of the Missouri River, which runs through seven states in its journey from Montana to Missouri. The United States Army Corps of Engineers is charged with the responsibility of managing this river and its attendant reservoirs. In carrying out this charge, the Corps must strike a balance among many interests, including flood control, navigation, and recreation. In good times, the Corps can accommodate all such interests, but, when facing a continuous drought, the Corps is forced to make hard choices. In the Spring of 2002, the Missouri River Basin was in the midst of just such a prolonged drought. The Corps decided to release

water from a single reservoir, Lake Oahe, to maintain downstream river flow. The State of South Dakota, where Lake Oahe is located, sought and received an injunction barring this release. This action led other states to seek similar injunctions. Within a period of days, courts had put four of the six main stem reservoirs off limits for releases. The State of Nebraska then sought and received an injunction requiring the Corps to maintain downstream river flow.

In this case we review the decisions of three district courts to issue preliminary injunctions binding the Corps. District Courts in North Dakota and South Dakota enjoined the Corps from drawing down reservoirs located in their states for short periods of time, and a Nebraska District Court ordered the Corps to abide by its governing Missouri River operations manual. We reverse the judgments of the District Courts in North Dakota and South Dakota and affirm the judgment of the Nebraska District Court.

I.

Congress enacted the Flood Control Act of 1944 to provide for the orderly management of the Missouri River Basin. Pub.L. No. 78-534, 58 Stat. 887 (1944). The Act had numerous purposes. First, it entrusted the Army Corps of Engineers with the task of managing the River basin. The Corps is charged, for example, with constructing and managing the dams and reservoirs created by the Act, 16 U.S.C. § 460d, making contracts for use of surplus water available at the reservoirs, 33 U.S.C. § 708, and "prescrib[ing] regulations for the use of storage allocated for flood control or navigation at all reservoirs . . . the operation of any such project shall be in accordance with such

regulations," 33 U.S.C. § 709.[1] The Act thus granted the Corps considerable power over the River basin.

The Act also laid out certain substantive interests that it was to serve. The dominant functions of the Flood Control Act were to avoid flooding and to maintain downstream navigation. *ETSI Pipeline Project v. Missouri,* 484 U.S. 495, 512, 108 S.Ct. 805, 98 L.Ed.2d 898 (1988). The Act's dominant functions were expressed repeatedly in three Congressional Documents: Senate Documents 191 and 247 and House Document 475. See Flood Control Act Section 9, 58 Stat. at 891. House Document 475, which represented one of two competing plans, confirmed this view, stressing flood control. H.R. Doc. No. 475, 78th Cong., 2d Sess. 28-29 (1944). At the same time, however, the Act recognizes secondary uses of the River including irrigation, recreation, fish, and wildlife. See Flood Control Act Section 4, 58 Stat. at 889-90; 33 U.S.C. § 708; 43 U.S.C. § 390. The House Document just cited noted that the management plan "would also provide for the most efficient utilization of waters of the Missouri River Basin for all purposes, including irrigation, navigation, power, domestic and sanitary purposes, wildlife, and recreation." H.R. Doc. No. 475, *supra,* at 29. Senate Document 247, which reconciled the competing proposals, included a discussion of the purposes of Lake Oahe: "the irrigation of 750,000 acres of land . . . as well as to provide useful storage for flood control, navigation, the development of

[1] The Act also gave certain responsibilities to the Department of the Interior. See generally *ETSI Pipeline Project v. Missouri,* 484 U.S. 495, 108 S.Ct. 805, 98 L.Ed.2d 898 (1988). These responsibilities are not at issue in this case.

hydroelectric power, and other purposes." S. Doc. No. 247, 78th Cong., 2d Sess. 3 (1944). Thus, the Flood Control Act provided the Corps with a wide array of interests to consider in regulating the River.

While the Flood Control Act laid out broad goals, the intricacies of the River basin required the Corps to work out a specific management plan. The Corps devised this more specific management plan and published it in the *Missouri River Main Stem Reservoir System Reservoir Regulation Manual*, commonly referred to as the Master Manual, which explains how the Corps is to go about managing the River system. The most recent version of the Master Manual was promulgated in 1979, although the Corps has been in the process of revising the manual since the late 1980's, and the Corps assures this Court that the revisions should be completed quite soon.

The Master Manual accomplishes numerous goals. For one, Section IX lays out the "general approach" that is to be used to plan reservoir operation, an approach that calls for sequential consideration of the various interests. Predictably, it indicates that flood control will be provided for first. After flood control, the Manual calls for the Corps to consider (in order) irrigation, water supply and water-quality requirements, navigation and power, and finally recreation, fish, and wildlife. Notably, the final provision reads: "insofar as possible without serious interference with the foregoing functions, the reservoirs will be operated for maximum benefit to recreation, fish and wildlife." Master Manual Section 9-3. In addition to laying out this general approach, the Master Manual includes more specific technical guidelines. Thus, the Manual lays out minimum flows that are to be maintained at different points on the River, Master Manual Section 9-17, and

methods for deciding the length of the navigation season based upon river flow at certain times of the year. Master Manual Section 9-18. The Master Manual also explains that the Corps has always promulgated Annual Operating Plans, which lay out the Corps's particular plan for the year. Master Manual Sections 9-47 & 9-48. These plans also give the public notice of the Corps's plan for operating the system, allowing interested individuals to order their affairs for the year.

The dispute in this case arose out of the prolonged drought conditions that the Missouri River has been experiencing over the last several years. This shortage of water has forced the Corps to make decisions about the allocation of water between the states and between different interests. Pursuant to its 2002 Annual Operating Plan, the Corps decided to release water from Lake Oahe in South Dakota to maintain downstream navigation on the Missouri River. At the same time, the Corps was planning on holding water levels constant at the other five reservoirs. The Corps generally lowers only one reservoir if releases are necessary to maintain navigation, and it attempts to shift this burden from year to year. Because Lake Oahe's water level had not been reduced the year before (it had actually increased), the Corps chose Lake Oahe to bear the burden of the drought in 2002.

The Corps's plan to release water from Lake Oahe was troubling to South Dakota, because it wanted the water level of Lake Oahe to be held constant from late April to late May to allow for a fruitful fish spawn during that period. Lake Oahe has become a well-known destination for trophy walleye fishing. Since 1997, however, the State noticed a marked reduction in the quality of fish in the lake – a reduction that has reduced recreation at the lake.

The State concluded that this reduced quality was caused by a sizable decrease in the number of rainbow smelt, the prey fish of the walleye. This decrease was due in part to a massive water release from Lake Oahe in 1997 and in part to the overpopulation of walleye. South Dakota set out to remedy this problem by allowing for increased walleye fishing, which would reduce the number of predators of the rainbow smelt. After this increased fishing, the State concluded that the rainbow smelt were poised to have an extremely fruitful spawn in 2002. Because the smelt lay their eggs in shallow water, however, the spawn would not be successful if the water level was reduced even by as little as six inches. South Dakota therefore asked the Corps to forego its plans to release water from Lake Oahe during the smelt's spawning season – late April until late May. The Corps indicated that it nevertheless intended to abide by its annual operating plan, which called on the Corps to continue the releases from Lake Oahe to maintain downstream navigation.

On April 25, 2002, after the Corps refused to change its plans, the State of South Dakota filed suit in the District Court for South Dakota. The suit claimed that the Corps acted arbitrarily and capriciously in maintaining downstream navigation rather than maximizing recreation at upstream reservoirs. The suit sought a declaration that the Corps's practice of always requiring one of the reservoirs to bear the burden of a drought was unlawful. The suit sought to enjoin the Corps from releasing water from Lake Oahe until after the spawning season. After a hearing, the Court entered a temporary restraining order requiring the Corps to maintain the water level until a preliminary-injunction hearing could be held. When the Court entered this restraining order, the Corps announced

its intention to release water from Lake Francis Case to offset its inability to lower Lake Oahe. Lake Francis Case is also in South Dakota, and the State requested that the District Court consider the propriety of lowering Lake Francis Case at the preliminary injunction hearing. Before the preliminary-injunction hearing, the State of Nebraska and numerous private entities moved to intervene in the case, but the Court denied these motions. After hearing arguments from all sides on May 9 and 10, the District Court entered a preliminary injunction that required the Corps to maintain the water level at both Lake Oahe and Lake Francis Case until May 25 – the end of the spawning season.

The South Dakota Court's injunction had a cascading effect. To cope with the injunction, the Corps planned to lower Lake Sakakawea, which is located in North Dakota. The State of North Dakota brought suit in the federal District Court in North Dakota to enjoin the Corps from lowering this reservoir. The District Court entered a temporary restraining order on May 12, which required the Corps to maintain the lake's water level. When the TRO expired ten days later, the parties agreed that it would be converted into a preliminary injunction.[2]

When it was not allowed to intervene in the South Dakota case, the State of Nebraska went to the federal District Court in Nebraska seeking a preliminary injunction that would require the Corps to operate the River

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[2] The Corps then planned to lower Fort Peck Reservoir in Montana, but as in North Dakota and South Dakota, Montana went to court and obtained an injunction barring any release. This injunction ran its course, and the State of Montana has since dropped its suit against the Corps.

according to the Master Manual and the 2002 Annual Operating Plan. On May 13, the District Court entered an injunction ordering as much. The Court noted that it was "reluctant to interfere with the discretion of the Corps, but must recognize that court orders in other jurisdictions designed to safeguard interests of upstream users are quickly stripping the Corps of Engineers of its ability to function as an objective steward of the water flows in the Missouri River Basin." Addendum to Corps's Brief 29. This order left the Corps in a thorny predicament. The Nebraska order required it to maintain navigation, but with Lakes Oahe, Francis Case, and Sakakawea and Fort Peck Reservoir off limits, the Corps was forced to rely on the two smallest reservoirs for the releases. Ultimately, downstream flows were reduced, and navigation and other downstream interests suffered.

The Corps immediately appealed the judgments of each of the District Courts. Additionally, Nebraska and the other proposed intervenors have appealed the South Dakota District Court's orders denying their motions to intervene. This Court stayed each of the injunctions on May 22, 2002. The injunctions in North Dakota and South Dakota expired by their own terms on May 25, 2002. The Nebraska District Court's injunction has not expired and will go into effect again if we lift our stay.

II.

We must decide whether the three District Courts erred in enjoining the Corps and whether the South Dakota Court erred in denying the motions to intervene. We conclude that the District Courts in North Dakota and South Dakota erred in enjoining the Corps from lowering

reservoirs to maintain navigation, and that the District Court in Nebraska correctly ordered the Corps to follow the Master Manual. We also conclude that the South Dakota District Court erred in denying the motions to intervene.

A.

Before reaching the merits of this case, we must consider whether the expiration of the preliminary injunctions in North Dakota and South Dakota renders the appeals of those orders moot. Although none of the parties to this appeal has urged this Court to dismiss the case, we must nevertheless satisfy ourselves that this case is not moot. See *Kremens v. Bartley*, 431 U.S. 119, 136, 97 S.Ct. 1709, 52 L.Ed.2d 184 (1977). We are so satisfied for numerous reasons. First, we note that the injunction issued by the District Court in Nebraska is still in effect, so the Corps's appeal from that injunction is clearly not moot, and many, if not all, of the substantive issues raised by the South Dakota and North Dakota appeals will be decided anyway.

The North Dakota and South Dakota cases fall within the well-known "capable of repetition, yet evading review" exception to the mootness doctrine. *Weinstein v. Bradford,* 423 U.S. 147, 149, 96 S.Ct. 347, 46 L.Ed.2d 350 (1975). This exception applies when two conditions are met: "(1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again." *Spencer v. Kemna,* 523 U.S. 1, 17, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998).

A preliminary injunction that bars the Corps from releasing water from the reservoirs during spawning will never last long enough to allow for full litigation because of the brevity of spawning season. Thus, if these actions were to recur, they would continually evade review. Moreover, we have every reason to suspect that these events will recur. On previous occasions, we were inclined to think this type of litigation would not repeat itself. See *South Dakota v. Hazen,* 914 F.2d 147 (8th Cir.1990) (deciding case was moot because the injunction had expired); *cf. Missouri ex rel. Nixon v. Craig,* 163 F.3d 482 (8th Cir.1998) (deciding that a challenge to the Corps's annual operating plan was moot because the plan had lapsed). But repetition now seems quite likely. At oral argument the parties agreed that drought conditions continue along the River, meaning that the Corps will again be forced to choose between releasing water from the reservoirs or letting downstream navigation suffer. We have every reason to believe that the Corps will choose to release water from at least one reservoir, and we are confident that the legality of such a release would again be challenged in the courts. In the end, then, we are persuaded that the questions presented in this appeal are likely to recur, yet will evade review when they do. Therefore, the expirations of the preliminary injunctions do not render the appeals moot.

B.

Next, we must decide whether the South Dakota District Court erred in refusing to allow various parties to intervene in the case brought by the State of South Dakota. After the initiation of the suit by South Dakota, the District Court received three separate motions to intervene as of right under Federal Rule of Civil Procedure

24(a)(2): one from MO-ARK Association, one from Ergon Asphalt and Emulsions, Inc., and other corporate entities, and one from the State of Nebraska.[3] A party seeking to intervene must establish both that it has standing to complain and that the elements of Rule 24(a)(2) are met. Rule 24(a)(2) requires that the proposed intervenor establish that it claims an interest in the property or transaction which is the subject of the litigation, that disposition of the litigation in the party's absence may impede or impair its ability to protect its interest, and that the interest is not adequately represented by the current parties to the suit. Fed.R.Civ.P. 24(a)(2); *Jenkins v. Missouri,* 78 F.3d 1270, 1274 (8th Cir.1996). The South Dakota District Court concluded that the proposed intervenors failed to prove that they had standing and failed to meet the requirements of Rule 24(a)(2). Additionally, the Court concluded that allowing the State of Nebraska to intervene would be problematic because it would put Nebraska and South Dakota on opposite sides of the dispute, thus bringing the case within the exclusive jurisdiction of the Supreme Court.

We review the District Court's conclusion that these parties were not entitled to intervene *de novo. Arrow v. Gambler's Supply, Inc.*, 55 F.3d 407, 409-10 (8th Cir.1995). The proposed intervenors presented sufficient evidence of their interest in the case to give them standing to intervene.

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[3] The proposed intervenors also sought permissive intervention, and the State of Nebraska moved to be allowed to join as an indispensable party under Rule 19. Because we ultimately rule that each of the intervenors was entitled to intervene as a matter of right, we need not reach these alternative theories.

Each of the proposed intervenors presented substantial evidence that the remedies sought by the State of South Dakota threatened it with serious injury. MO-ARK represents numerous interests along the Missouri River, including members with interests in navigation, agriculture, and water treatment. Ergon and the corporate entities that joined its motion to intervene utilize the lower Missouri River to transport their goods. And the Missouri River runs through the State of Nebraska. Each of these proposed intervenors claimed an interest in the litigation based upon the fear that the Court's ruling would lead to decreased water flow downstream. They offered to present significant evidence that a reduction in the flow of the River would cause a great deal of harm to downstream interests. Among the threats were an interruption in their ability to navigate the River, problems for power plants that relied upon the River water for cooling, and decreases in water quality for community water supplies. Moreover, the parties presented evidence that decreasing the flow for even a short period of time could be troublesome because of the effects that such a short-term reduction could have on wildlife. Specifically, the parties presented evidence that if the water levels were decreased, two endangered species of birds would nest on the newly exposed river bed. Once these birds nested, the proposed intervenors feared, the water flow could not be increased until after the fledgling birds could leave the nest. Thus, according to this argument, flow reduction could not be limited to a short term.

The Court did not disagree with this evidence, but merely held that it did not believe that its order would lead to a reduction in downstream flow. The Court noted that it was not ordering the Corps to reduce downstream

flows, but only to maintain the water levels at the South Dakota Reservoirs. Thus, the Corps was free to maintain the downstream flows by lowering water levels at other reservoirs. The Court found that because its preliminary order would not require a reduction in flow, the proposed intervenors did not have an interest in the litigation. This finding led the Court to reject the motion to intervene not only on Rule 24 grounds but also for lack of standing. However, the proposed intervenors did not move to intervene in only the preliminary-injunction hearings. Instead, they sought to intervene in the whole case. As the proposed intervenors explain, the State of South Dakota was seeking more than a preliminary injunction for the short period of time that it lasted. South Dakota is also seeking a more permanent, forward-looking declaration that will affect the way the Missouri River is managed in the future. South Dakota alleges that the Corps should "give all water uses equal consideration while the Master Manual Review is undergoing a revision," First Amend. Compl. ¶ 39, and to accomplish this goal seeks injunctive relief "to prevent irreparable harm to the fisheries of the mainstream reservoirs, when the harm is inflected [sic] to benefit downstream navigation." *Id.* at ¶ 55. If South Dakota ultimately prevails in this case, the Corps may be forced to reduce downstream flows in drought conditions to maintain the water levels at all of the reservoirs. When we consider the effect that an ultimate ruling for South Dakota might have, we think the proposed intervenors presented sufficient evidence of a threatened injury to give them standing.

The District Court did not base its decision solely upon its conclusion that the proposed intervenors lacked standing; the Court also concluded that the proposed

intervenors had not proved that they were entitled to intervene under Rule 24(a)(2). The Court first concluded that the proposed intervenors had not shown that they had an interest in the litigation. Again, we disagree. Success by South Dakota in the whole litigation would impair the proposed intervenors' interests in the operation of the River.

The Court also concluded that the proposed intervenors were not entitled to participate in the action because their interests were adequately represented by the Corps under the *parens patriae* theory. This theory creates a presumption that a government agency will represent the interests of all citizens in cases raising matters of sovereign interest. *Mausolf v. Babbitt,* 85 F.3d 1295, 1303 (8th Cir.1996). Proposed intervenors can rebut this presumption, however, if they can make a strong showing of inadequate representation, for example, by showing that the proposed intervenor's interest is not subsumed within the general interests of the public. *Id.* The District Court concluded that the presumption applied in this case, and that the proposed intervenors had not overcome it. We respectfully disagree.

The *Mausolf* case is instructive. There, snowmobile enthusiasts sued the Secretary of the Interior, seeking to enjoin the enforcement of certain snowmobiling restrictions in a federal park. Various conservationist organizations moved to intervene in the case for fear that the Secretary would settle the case or back away from his rules. The District Court denied intervention, partly because of the *parens patriae* presumption. This Court reversed, finding that the presumption was rebutted. We noted that the government must represent the interests of all of its citizens, which often requires the government to

weigh competing interests and favor one interest over another. Where such conflicts exist, "even the Government cannot always adequately represent conflicting interests at the same time." *Id.* at 1303.

This case presents just such a conflict. The Corps is charged with managing the Missouri River system as a whole – a charge that requires it to balance the interests of the upstream and downstream users. The proposed intervenors, on the other hand, wish to represent exclusively downstream interests. Indeed, South Dakota's lawsuit itself indicates a fear that the Corps cannot adequately represent the interests of all parties. The very crux of this suit is that the Corps has failed in its representative role. Yet South Dakota asks this Court to hold that the Corps will adequately represent downstream users. We decline to do so. Given that the Corps is asked to balance multiple interests, we conclude that it cannot adequately represent the interests of downstream users in this case. The *parens patriae* presumption, therefore, does not present an obstacle to intervention. Thus, the proposed intervenors met the requirements for intervention under Rule 24(a)(2) and were entitled to intervene.

The District Court presented an additional reason for not allowing the State of Nebraska to intervene – the Court feared that doing so would strip the Court of jurisdiction. The Court worried that allowing Nebraska to intervene would create a case or controversy between two states – a controversy within the Supreme Court's exclusive original jurisdiction. This was not an appropriate reason for rejecting Nebraska's motion to intervene, however, because, even had Nebraska been allowed to intervene, the controversy would not have been between South Dakota and Nebraska. The Supreme Court's exclusive jurisdiction

under 28 U.S.C. § 1251(a) applies only when one state seeks relief from another state. See *Mississippi v. Louisiana,* 506 U.S. 73, 78 n. 2, 113 S.Ct. 549, 121 L.Ed.2d 466 (1992) ("Louisiana's intervention is also unaffected by § 1251(a) because it does not seek relief against Mississippi."); see also *United States v. Nevada*, 412 U.S. 534, 537, 93 S.Ct. 2763, 37 L.Ed.2d 132 (1973) (per curiam) ("The complaint . . . is not one alleging a case or controversy between two States within the exclusive jurisdiction of this Court, under 28 U.S.C. § 1251(a), but a dispute between the United States and two States over which this Court has original but not exclusive jurisdiction under § 1251(b)(2)."); *Connecticut v. Cahill*, 217 F.3d 93 (2d Cir.2000) (holding that Connecticut could maintain an action against officers of New York in federal district court because the action was styled as a suit against officers, not the state). In this case, the controversy is between each of the states and the Corps. Although the states would have had adverse interests, each state would be seeking relief from the Court against the Corps. Thus, allowing intervention by Nebraska would not strip the District Court of jurisdiction.

The District Court's denials of the motions to intervene are reversed.

III.

We now turn our attention to the question of whether the District Courts erred in issuing preliminary injunctions in these cases. The decision to issue a preliminary injunction is within a district court's discretion in the first instance. The following factors govern the exercise of that discretion:

> Whether a preliminary injunction should issue involves consideration of (1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.

Dataphase Systems, Inc. v. C L Systems, Inc., 640 F.2d 109, 113 (8th Cir.1981) (en banc). We review a district court's decision to grant a preliminary injunction for abuse of discretion, and can reverse such an injunction only if the district court "clearly erred in its characterization of the facts, made a mistake of law, or abused its discretion in considering the equities." *Bhd. of Maint. of Way Employees v. Burlington Northern R.R.*, 802 F.2d 1016, 1020 (8th Cir.1986).

The facts of these cases are largely undisputed, and the District Courts did not clearly err in their fact finding. All sides seem to agree that each of the plaintiffs can show that they will suffer irreparable harm absent the injunctions imposed. The States of North Dakota and South Dakota demonstrated that the population of fish in the reservoirs would decrease if the water levels were not maintained. Each state presented evidence that such a decrease would lead to a decrease in recreation on the reservoirs. Nebraska presented evidence that it would be harmed by the Corps's failure to follow the Master Manual, because the decreased flows would harm many of its citizens. In each case, the District Court concluded that the complaining party would suffer irreparable harm without an injunction. There was no clear error here.

The balance-of-harms and public-interest criteria present closer questions, but we need not pursue these

issues. The dispositive issue on this appeal is the likelihood that each plaintiff would succeed on the merits. In each of these cases, the plaintiffs are challenging agency actions. Thus, our review is guided by the Administrative Procedure Act. Under the APA, district courts review agency actions to determine whether they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In this case, however, the review is more complicated, because the Corps maintains that its actions are not subject to judicial review at all. It contends that the Flood Control Act commits these decisions to the Corps's discretion. See 5 U.S.C. § 701(a)(2). Thus, before considering whether the Corps's actions were unlawful or were arbitrary and capricious, we must decide whether the Corps's actions are subject to judicial review.

A. Is There Law To Apply?

The Corps first argues that the District Courts erred because its actions are not subject to judicial review. As a general rule, courts presume that Congress intended agency action to be subject to judicial review. *Kenney v. Glickman*, 96 F.3d 1118, 1124 (8th Cir.1996); see also 5 U.S.C. § 702. There is a very narrow exception to this presumption "applicable in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971) (internal quotations omitted). This exception is quite narrow and does not apply where statutes provide even minimal guidance to limit agency discretion. *Id.* at 411-13, 91 S.Ct. 814 (holding that an agency action was subject to review because the granting

statute provided factors for the agency to consider in making the decision). And courts can find law to apply either "in the underlying statute or in the regulations by the agency interpreting the underlying statute." *Kenney*, 96 F.3d at 1124. Thus, to prevail on its claim that its actions are not subject to judicial review, the Corps must demonstrate that neither the Flood Control Act nor any of its internal regulations provides law to apply in these cases. We reject this argument. We conclude that the Corps's actions are constrained both by the Flood Control Act and by the Master Manual.

The Flood Control Act clearly gives a good deal of discretion to the Corps in the management of the River. But this discretion is not unconstrained; the Act lays out purposes that the Corps is to consider in managing the River. The Act recognizes what the Supreme Court has called the dominant functions of the River's reservoir system – flood control and navigation. *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 512, 108 S.Ct. 805, 98 L.Ed.2d 898 (1988). While flood control and navigation are dominant functions, the Act also recognizes recreation and other interests and secondary uses that should be provided for. Flood Control Act Section 4, 58 Stat. at 889-90. The text of the Flood Control Act thus sets up a balance between flood control, navigation, recreation, and other interests. Because the Flood Control Act calls on the Corps to balance these various interests, the courts can review the Corps's decisions to ensure that it considered each of these interests before making a decision. What the text of the Act does not provide is a method of deciding whether the balance actually struck by the Corps in a given case is correct or not. Nevertheless, the Flood Control Act clearly

provides some law to apply, so the decisions of the Corps are subject to judicial review under the Act.

The minimal guidance provided by the Flood Control Act is only the beginning of our inquiry, however. We turn next to the Master Manual to decide whether it binds the Corps. The Corps has promulgated the Master Manual, which sets out priorities and directs the Corps to take certain actions in given situations. Upon close examination, we conclude that the Master Manual is binding on the Corps because it sets out substantive requirements, and its language and context indicate that it was intended to bind the Corps's discretion.

The Corps maintains that the Manual is not binding because it is not a rule, merely a policy statement. Indeed, the Master Manual was not promulgated through the notice-and-comment rulemaking procedures of the Administrative Procedure Act. This does not by itself render the Master Manual non-binding. Agency statements can be binding upon the agency absent notice-and-comment rulemaking in certain circumstances. Where a policy statement purports to create substantive requirements, it can be a legislative rule regardless of the agency's characterization. *Northwest National Bank v. United States Dep't of the Treasury*, 917 F.2d 1111, 1116-17 (8th Cir.1990); see also *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C.Cir.1997) (holding that policy statements can become binding on the agency if so intended, which is a determination made by examining the statement's language and context).

The language of the Master Manual itself implies that it is binding. Throughout, the Manual speaks of what "is" done or "will" be done. Section 9-3 of the Manual, for

example, explains that the "general approach, which was developed and generally agreed upon during planning and design of the reservoirs, *is observed* in operation planning and subsequent reservoir regulation procedures." Master Manual Section 9-3 (emphasis added). This general approach prioritizes the different interests that will be considered in regulating the reservoirs. The interests are to be provided for in this order: flood control, irrigation and upstream beneficial uses, downstream water supply, navigation and power, power generation, and finally recreation and wildlife. In the midst of this prioritization, the Master Manual speaks in mandatory terms. Focusing on the areas of most interest to this case, the fourth priority section reads: "the remaining water supply available *will be regulated* in such a manner that the outflow from the reservoir system at Gavins Point provides for equitable service to navigation and power." *Id.* (emphasis added). Two paragraphs later, the Manual indicates that recreation, fish, and wildlife will be provided for insofar as possible, but consistently with the preceding considerations (including navigation). Section 9-3 itself seems to indicate that the Manual was intended to bind the Corps, and later provisions bolster this conclusion.

In addition to sections, like Section 9-3, which explain general priorities and goals, the Master Manual also includes provisions that direct the Corps to take certain actions when given circumstances occur. In Section 9-19, for example, the Manual provides that "Fall extensions of the navigation season beyond the normal 8-month length will be scheduled" when certain triggering events occur. Other provisions require the Corps to maintain minimum flow levels at various points on the River at different times. See generally Master Manual Section 9. These

provisions can hardly be termed non-binding; they, like Section 9-3, speak of what the Corps will do in given circumstances. The Manual's provisions, then, do not merely give advice to administrators; instead, they direct the operation of the River. There is no indication in the text of the Manual that the Corps is free to ignore its provisions if it so chooses. Indeed, the language of the Manual appears to assume that members of the Corps must follow its provisions.[4]

In addition to the Master Manual itself, the Corps's promulgated regulations indicate that the Manual is binding. The Code of Federal Regulations includes a section that "prescribes policies and procedures to be followed by the U.S. Army Corps of Engineers in carrying out water control management activities, including establishment of water control plans for Corps and non-Corps projects as required by Federal laws and directives." 33 C.F.R. § 222.5 (2002). The regulation goes on to require the Corps to develop water control plans "to conform with objectives and specific provisions of authorizing legislation and applicable Corps of Engineers reports," and indicates that "[t]horough analysis and testing studies will be made as necessary to establish the optimum water control plans possible within prevailing constraints." *Id.* § 222.5(f). "[P]lans developed for specific projects and reservoir systems will be clearly documented in appropriate water

[4] The Master Manual contains various other provisions that bolster this conclusion, including a provision that the Manual may be revised when necessary. Master Manual Section I. If the Manual were non-binding, there would be little need to include a provision allowing for revision; the Corps could simply ignore the Manual entirely.

control manuals." *Id.* The regulation also recognizes the need to create a "Master Manual" in cases where several projects are linked together. *Id.* § 222.5(i)(2). These manuals are to be created with the aid of public involvement. *Id.* § 222.5(g)(2). And once produced, these plans are to be made publicly available. *Id.* § 222.5(g)(2)(ii). These provisions support the conclusion that the Manual binds the Corps. The most significant of these provisions is the indication that in creating Master Manuals, the Corps will consider public comment on its plans and then publicize the completed plans. The public-comment provision recognizes the power that these Manuals wield – a power that should be exercised only after public consideration. The provision which makes these manuals publicly available likewise recognizes that these manuals will affect individuals, and that potentially affected people should have access to the documents. These are not the types of procedures one would expect in the promulgation of an internal, non-binding agency guideline.

Moreover, the Corps's treatment of the Manual indicates that it is binding. Lawrence Cieslak, a member of the Corps, indicated in his testimony to the South Dakota District Court that all of the critical decisions that were made in the Spring of 2002 were based upon the instructions in the Master Manual. The Corps decided the length of the navigation season and decided not to cut the releases from the reservoirs because the Master Manual instructed as much. Moreover, Mr. Cieslak concluded his testimony by observing that "we have stated that we will continue to try to meet the operational objectives of the current Master Manual," until a revised manual is completed. Appendix at 792. As this testimony demonstrates, the Corps continues to treat the Master Manual as a how-to

manual for operating the Missouri River. The Corps has treated and continues to treat the Master Manual as a constraint on its discretion in operating the River.

Because the language and context of the Master Manual and the Corps's treatment of the manual indicate that it binds the Corps, we conclude that it is binding. The Corps is not free to ignore the Master Manual (though it may elaborate upon details of operation in its annual operating plans), and courts can review the Corps's actions to ensure conformity. In the end, then, there is sufficient law to apply in these cases. In each case, courts can assess whether the Corps's actions run afoul of either the Flood Control Act or the Master Manual.

B. South Dakota

We turn our attention first to the injunction entered by the South Dakota District Court. The Court enjoined the Corps from releasing water from either Lake Oahe or Lake Francis Case. The State of South Dakota claimed that it was entitled to this relief on three grounds. First, it alleged that the Flood Control Act requires the Corps to act so as to maximize all interests on the River, including recreation. Second, the State argues that it is entitled to relief because the Corps is judicially estopped to favor navigation over recreation. Finally, South Dakota maintains that the Corps acted arbitrarily and capriciously in favoring navigation over recreation. We hold that none of these arguments is likely to succeed on the merits.

South Dakota argues that the Flood Control Act requires the Corps to maximize the benefits of the River, including fish-and-wildlife benefits.[5] This argument is not based upon the text of the statute, but instead upon the Act's legislative history. Senate Document 247 states that the plan "will secure the maximum benefits for flood control, irrigation, navigation, power, domestic and sanitary purposes, wildlife, and recreation." S. Doc. No. 247, at 5; see also H.R. Doc. No. 475, at 29 ("the comprehensive plan would . . . provide for the most efficient utilization of the waters of the Missouri River Basin for all purposes, including irrigation, navigation, power, domestic and sanitary purposes, wildlife, and recreation."); *id.* at 3 ("When completed the basin plan will be operated for maximum multiple purpose use."). Moreover, Senate Document 191, which represented one of the original competing views, included a provision that stated that "during the spawning season every effort will be made to maintain as constant a pool level as possible." S. Doc. No. 191, 78th Cong., 2d Sess. 211 (1944). South Dakota maintains that the sum total of this legislative history compels the Corps to balance the interests each year so as to maximize each category of benefits, and that courts can review the annual operating plans to ensure that they do indeed maximize the benefits.

We reject this argument. South Dakota's proffered standard – whether the Corps's management of the River maximizes the benefits to all interests – is not the kind of standard that courts regularly employ in reviewing agency

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[5] South Dakota does not argue that the Corps's decision to release water from Lake Oahe was contrary to the Master Manual.

action. As a general rule, courts defer to agency policy decisions because it is not a court's "function to substitute [its] judgment for that of the agency." Aman & Mayton, Administrative Law § 13.10.2 (1993). Under South Dakota's proffered standard the Corps's actions would receive no deference and the courts could be called upon to review every decision that the Corps makes, no matter how minute. Although Congress could give the courts the power to engage in such searching review, we do not believe that the portions of the Flood Control Act's legislative history to which South Dakota directs this Court are sufficient to achieve such a radical shift from the normal standard of review. Indeed, the statements that South Dakota points to are merely general statements of policy goals. They are not phrased as limitations on the Corps's discretion. Given that this argument finds no support in the text of the statute, and given the vagueness of the legislative history on the matter, we refuse to apply South Dakota's proffered standard. Courts are simply not empowered to review every decision of the Corps to ensure that it maximizes the benefits of the River for all interests. Indeed, such a standard would be impossible to meet, anyway. In times of drought it is not possible for both navigation and fishery benefits to be maximized. Something has to give.

South Dakota next argues that judicial estoppel requires the Corps to give equal consideration to recreation and other interests including navigation. This argument is based upon an agreement reached in previous litigation in Montana. There, South Dakota maintains, the Corps agreed to give all interests, including recreation, equal consideration in the management of the River – as opposed to giving flood control, navigation, or other interests priority

over recreation – until the revision of the Master Manual was complete. Even assuming that the elements of judicial estoppel were met in this case,[6] the only thing that the Corps agreed to was that it would give all interests equal consideration. S.D. Brief at 27 (citing the ruling in a previous suit that gave rise to the judicial estoppel claim). Equal consideration does not mean equal results. In this case, South Dakota has presented no evidence that the Corps did not give equal consideration to recreation; only that in the end, the Corps decided to lower one reservoir per year during a drought to maintain navigation. This result could easily arise from the Corps's giving equal consideration to each interest. Indeed, the Corps maintains that it considered the interests of recreation equally. Testimony of Lawrence Cieslak, App. at 823 ("[I]n the Annual Operating Plan we are giving equal consideration to all of the project purposes in trying to meet the operation objectives.") The Corps concluded that it does not need to hold the water level at every reservoir constant every year to allow recreational activities to flourish. The evidence before the Corps indicated that a good fish spawn once every four to five years is sufficient to maintain the fisheries of each reservoir. Master Manual Section 9-31. According to this conclusion, then, the Corps can lower each reservoir on a rotating basis (one per year) and still maintain the fish stock in the reservoirs. Given this fact, the Corps's decision to lower one reservoir per year during a drought simply does not provide any proof that the

[6] Because we rule that there is no evidence that the Corps failed to give equal consideration to recreation, we do not reach the question of whether the elements of judicial estoppel were met in this case.

Corps was not giving recreation equal consideration. South Dakota is unlikely to succeed on its judicial-estoppel theory.

Finally, we must consider whether the Corps's decision to lower Lake Oahe in the Spring of 2002 to maintain downstream navigation was arbitrary and capricious. See 5 U.S.C. § 706(2)(A). "To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Overton Park*, 401 U.S. at 416, 91 S.Ct. 814 (citations omitted). To pass scrutiny, "[t]he agency must articulate a rational connection between the facts found and the choice made." *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 288, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974) (internal quotations omitted). This standard of review gives great deference to the policy decisions made by the agency and does not allow a court to overturn an agency action merely because the court would have acted differently; a court may find an action to be arbitrary and capricious only when there is no rational basis for the policy choice.

The policy choice that South Dakota is challenging is not arbitrary and capricious. The Corps provided a rational basis for its decision to lower one reservoir per year during drought conditions. The Corps had evidence that every reservoir did not need to have a good spawn each year to maintain the fish stocks. Thus, so long as each reservoir's water level was not lowered every year, the fish stocks in the reservoirs would not be irreparably harmed.

The Corps decided to alternate the harm among the reservoirs, maintaining the water level at all but one reservoir each year. This plan would presumably allow each reservoir to have a fruitful spawn five out of every six years even in the worst drought conditions. This plan was eminently rational. South Dakota's efforts to increase the rainbow smelt stock during the Spring of 2002 do not make the plan irrational. South Dakota knew that Lake Oahe's water level had not been lowered in 2001, and that it was thus among the candidates to be lowered in 2002. Moreover, if Lake Oahe had been lowered as planned in 2002, it presumably would not be lowered in 2003, which would allow for a fruitful spawn this year. The Corps's policy was not irrational when written and did not become irrational in the Spring of 2002 because of South Dakota's efforts on Lake Oahe. South Dakota, therefore, is not likely to succeed on its theory that the Corps acted arbitrarily and capriciously.

Because none of South Dakota's theories for relief is likely to succeed on the merits, it was not entitled to a preliminary injunction. We therefore reverse the preliminary injunction entered in the South Dakota District Court and remand the case to that Court for further proceedings consistent with this opinion.

C. North Dakota

The arguments raised by North Dakota in favor of affirming the injunction entered in the North Dakota District Court are quite similar to those made by South Dakota. Having already rejected South Dakota's judicial-estoppel theory and its argument that the Corps's policy to release water from one reservoir per year is arbitrary and

capricious, we need not address these arguments again. In addition, North Dakota argues that the Flood Control Act itself precludes the Corps from favoring navigation over recreation. This argument is simply incorrect; the Flood Control Act does not require the Corps to give equal treatment to recreation. The Flood Control Act provides little guidance about what priority the Corps can or must give to different interests. The evidence that we do have, including the sequential listing of interests that uniformly lists navigation before recreation, indicates that the Corps's primary concerns should be flood control and navigation. The Supreme Court appears to have accepted as much. *ETSI,* 484 U.S. at 512, 108 S.Ct. 805. The Corps has adopted this prioritization, as evidenced by the listing of interests in Section 9-3 of the Master Manual. The Corps's decision to adopt this prioritization was not impermissible.

Because, like South Dakota, North Dakota has not demonstrated that it is likely to succeed on the merits, the North Dakota District Court erred in entering a preliminary injunction in its favor. We therefore reverse the preliminary injunction and remand this case to the District Court for further proceedings consistent with this opinion.

D. Nebraska

The preliminary injunction entered in the Nebraska District Court was wholly different from those entered in North Dakota and South Dakota. The Nebraska District Court ordered the Corps to abide by the Master Manual because it concluded that the Manual binds the Corps. We can find no error with this conclusion. The Master Manual

does bind the Corps, and under 5 U.S.C. § 706, Nebraska was entitled to an order that the Corps abide by its own formally adopted policies.

The Corps argues strenuously against the preliminary injunction entered in Nebraska. It feels that it should not be bound by the Manual when unforeseen circumstances arise. The record before this Court does not allow us to assess the validity of this argument on this appeal. Probably the Corps should be accorded some flexibility if an unforeseen circumstance arises. We leave such questions to the District Court to decide on remand if necessary. The Nebraska District Court order granting a preliminary injunction is affirmed, and the stay entered by this Court is vacated. This case is remanded to the District Court for proceedings consistent with this opinion.

IV.

In summary, we conclude that the South Dakota District Court erred in denying the motions to intervene and in entering a preliminary injunction requiring the Corps to maintain the water level at Lakes Oahe and Francis Case. The Court's orders are, therefore, reversed, and the case is remanded for proceedings consistent with this opinion.

We likewise conclude that the North Dakota District Court erred in enjoining the Corps from releasing water from Lake Sakakawea. That Court's order is, therefore, reversed, and the case is remanded for proceedings consistent with this opinion.

Finally, we conclude that the Nebraska District Court did not err in entering a preliminary injunction requiring

the Corps to follow the Master Manual. That Court's order is, therefore, affirmed, and the case remanded for proceedings consistent with this opinion.

The motion for an expanded stay is denied as moot.

It is so ordered.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

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STATE OF SOUTH DAKOTA, and WILLIAM J. JANKLOW, GOVERNOR, Plaintiffs, -vs- LT. COLONEL KURT F. UBBELOHDE, DISTRICT ENGINEER, OMAHA DISTRICT, UNITED STATES ARMY CORPS OF ENGINEERS, and GENERAL DAVID A. FASTABEND, COMMANDER, NW DIVISION, PORTLAND, OREGON, Defendants.	*	CIV 02-3011 TEMPORARY RESTRAINING ORDER (Filed May 2, 2002)

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The State of South Dakota and its current Governor, William J. Janklow (collectively "the State"), instituted this action pursuant to Fed.R.Civ.P. 65 against the United States Army Corps of Engineers ("the Corps"), to prevent the continued, planned release of additional water out of Lake Oahe, effectively lowering Lake Oahe by several feet. The State argues that if Lake Oahe is lowered as planned, the State will suffer irreparable injury. This alleged irreparable injury is the loss of literally millions of rainbow smelt which serve as the primary food source for walleye, a popular sport fish. Lake Oahe is nationally known for its excellent walleye production and concominent [sic]

sport fishing. That national recognition pays big dividends to the State's treasury as well as to the local communities and businesses along Lake Oahe and highways leading to it. The State argues that if the Corps is permitted to lower the level of Lake Oahe, the State will lose many millions of dollars due to the devastating impact the loss of the smelt would have on the walleye fishing industry. After careful consideration of the materials submitted by the parties and the arguments made at the May 1, 2002 hearing, the court concludes that the Corps should be restrained as detailed below.

BACKGROUND

This case is the newest installment in an on-going, epic struggle between the Corps and the upper basin states of Montana, North Dakota, and South Dakota over the use of the Missouri River. The river is vital to the economies of the upper basis states as it is to the lower basin states of Iowa, Nebraska, Kansas, and Missouri. An important difference separating the lower basin states from the upper basin states is the use of the Missouri River by the lower basin states as a means of navigation. From Sioux City, Iowa, to St. Louis, Missouri, barges use the river to transport various items and commodities. It is undisputed that no barge traffic exists in the upper basin states. The upper basin states primarily use the river for hydroelectric power, irrigation, domestic water use, and recreational activities.

The Corps operates six dams and reservoirs located on the Missouri River in the upper basin pursuant to the Flood Control Act of December 22, 1944, 58 Stat. 887. Governing or guiding the Corps' operation of those dams

and reservoirs is the Master Manual which was last updated and adopted in 1979. It is that Master Manual which, at least in part, serves to fuel the on-going controversy between the parties. In the 1979 Master Manual, the Corps listed, in order of importance, the priorities it set out to achieve in this operation and regulation of the dams and reservoirs. Navigation was ranked fourth, with recreation, fish, and wildlife ranked sixth. In ranking them sixth, the Corps stated that, "insofar as possible without serious interference with the foregoing functions, the reservoirs will be operated for maximum benefit to recreation, fish, and wildlife." 1979 Master Manual, p. IX-1.

In other words, recreation, fish, and wildlife are subservient to and dependent for their existence on not seriously interfering with the five previous rankings of use. The upper basin states have repeatedly accused the Corps of subordinating their interests in maintaining and promoting their recreation industries to the interests of navigation. To put it rather bluntly, the upper basin states strongly object to having river water flushed south, causing harmful effects to fishing industries, so that barges may operate hundreds of miles away. In sum, the upper basin states want the Corps to afford recreation, fish, and wildlife a higher priority than they currently receive.

In 1989, the Corps announced it was going to overhaul its Master Manual. This process has been amazingly slow, being tied up in bureaucratic and political quagmires. Despite its announcement over a decade ago, the Corps

has not yet successfully revised the Master Manual.[1] In the interim, the Corps has relied on the 1979 Master Manual to guide its Missouri River operations.

In early and mid-1900's, walleye fishing and the revenue it raised significantly increased in South Dakota. This increase was largely due to the outstanding success of Lake Oahe as a nationally recognized trophy walleye fishery. From April to October of 1991 through 1998, an average of 265,743 angler trips were made to Lake Oahe every year. This fishing boon produced an average economic impact of approximately $20 million per year. Fishermen and women came to Lake Oahe because of the real possibility of catching a trophy walleye, that is, one weighing over eight pounds. During the summer months of 1993 to 1998, the average walleye harvested from Lake Oahe was larger than 17 inches. In sum, during the mid-1990's, Lake Oahe was a major revenue raiser for South Dakota and the communities which lie near it or on the route of travel. That continued revenue was dependent upon continued successful walleye fishing.

In 1997, walleye fishing on Lake Oahe began to suffer. A major contributing factor of that downturn was the Corps' decision in the spring of 1997 to release water through the Oahe Dam. In doing this, the Corps flushed almost a half a billion smelt through the Oahe Dam's turbines. The loss of so much smelt significantly altered the balance between predator and prey in Lake Oahe. Because its primary food source was lacking, the walleye

[1] In its submissions to the court in this case, the Corps claims that it is aiming to release its revised Master Manual in 2003.

population suffered. As one researcher observed, following the 1997 smelt crash, Lake Oahe became full of hungry, stunted walleyes in poor condition. As news of the crash and resulting poor walleye condition spread, anglers, not surprisingly, stayed away. In 2000, angler trips fell to a low of 109,665, approximately 156,078 fewer trips than was experienced, on average, between 1993 and 1998. The loss of so many anglers devastated the fishing economy as to Lake Oahe. Only $8.2 million dollars in revenue was generated in 2000, compared to the yearly average of nearly $20 million between 1991 and 1998. Thus, the smelt crash of 1997 produced a very real, tangible economic loss to South Dakota.

The State, in an effort to turn Lake Oahe walleye fishing around, implemented a bold management plan in 2001. The primary goal of the plan was to reestablish the balance between predator and prey in Lake Oahe. The State understood that future walleye fishing success hinged on temporarily lowering the number of walleyes in Lake Oahe. Walleye numbers had to be reduced to give the smelt an opportunity to rebound from the 1997 disaster. To accomplish this, the State greatly increased its walleye limits on Lake Oahe. It raised the limit from eight walleyes for two days of fishing to forty-two for three days of fishing.

Biologists for the State had reason for optimism earlier this spring. Their tests indicated that the balance between predator and prey in Lake Oahe had a real chance of recovery this year. Tests signaled that this year's smelt production would be high. This is due, in large part, to the natural smelt cycle that is beyond human control. It was also due, the State contends, to its bold management decision last year to dramatically increase

the walleye limits on Lake Oahe. Thus, the State had reason to hope that a successful smelt spawning season this year could reverse the last few years' poor walleye fishing seasons.

After collecting the data signaling a strong smelt spawn, biologists for the State sent this information to the Corps along with a request to maintain water levels on Lake Oahe between April 8 and May 22, 2002. Water levels play a crucial role in the success of the smelt spawn. Rainbow smelt lay their eggs in very shallow water along the shores of Lake Oahe. Generally, the eggs are laid in water no deeper than six inches with many of the eggs being laid in water no deeper than a quarter of an inch. If the eggs are exposed to air, they dry out and die rather quickly. Thus, lowering water levels on Lake Oahe after the eggs have been laid guarantees the smelt spawn will not survive. Despite this information, the Corps indicated that it planned to proceed with its earlier decision to continue to lower Lake Oahe by several feet. The Corps refused to maintain Lake Oahe's water levels between April 8 and May 22 as requested by the State. It is that decision which resulted in this litigation.

This litigation is not the first between the parties. In an action very similar to this one, the upper basin states sued the Corps in 1990 in federal court in North Dakota seeking an injunction prohibiting the Corps from releasing water from Lake Oahe in an effort to protect various sport and forage fish. The district court enjoined the Corps from releasing any additional water, but the United States Court of Appeals vacated the injunction without opinion. In a later decision, the Eighth Circuit vacated its prior decision and declined to reach the merits finding that the case had become moot and did not come within the exception

which allows a court to deal with an issue likely to reappear. *See State of South Dakota v. Hazen*, 914 F.2d 147 (8th Cir. 1990).

In 1991, the upper basin states again sued the Corps, this time in federal court in the District of Montana. The upper basin states argued that the Corps had improperly assigned downstream uses, i.e., navigation, a higher priority over recreation, fish and wildlife as a result of its alleged erroneous interpretation and the unlawful static priorities of the 1979 Master Manual. Because the Master Manual was allegedly set to be revised, the Corps, the State argues, mooted the lawsuit by agreeing to give all water uses equal consideration while the Master Manual was being reviewed. Thus, the case was dismissed.

Despite the Corps' assurances of equal use consideration in 1991, the State maintains that the Corps has not kept its word and misrepresented matters to the district court in Montana. The State contends that a temporary restraining order is necessary to keep the Corps from decimating the rainbow smelt population by continued water releases from Lake Oahe. The State argues that the extraordinary remedy of the temporary restraining order is necessary because, unless the Corps is immediately restrained from releasing water out of Lake Oahe, the rainbow smelt spawn will irreparably suffer, causing significant financial losses for South Dakota, both this year and in years to come. The immediacy of the State's request for a temporary restraining order is dictated by the fact that the smelt spawn has begun and will conclude around May 22. Unless this court restrains the Corps continued water releases, the State argues, the smelt spawn will be lost. There is no dispute about that.

DISCUSSION

In deciding whether to grant or deny a request for a temporary restraining order, the court is to consider the following four factors: (1) the threat of irreparable harm to the State; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other litigants; (3) the probability that the State will succeed on the merits; and (4) the public interest. *See Dataphase Systems, Inc. v. C.L. Systems, Inc.*, 640 F.2d 109, 113 (8th Cir. 1981). In reviewing such a request, the court is to adopt a flexible approach that will enable it to encompass the particular circumstances of the case. *Id.* In balancing the equities, no single factor listed above is determinative; rather, the court should employ a pragmatic approach, keeping in mind the relative injuries to the parties and the public. *Id.* If the movant has raised a substantial question and the equities are otherwise strongly in its favor, the showing of success on the merits can be less. *Id.*

The threat of irreparable harm to the State is real. As detailed above, the State's revenue from walleye-related fishing on Lake Oahe has decreased from nearly $20 million in 1996 to just over $8 million in 2000. A primary cause of that decrease was the disastrous results to the smelt spawn of 1997 when almost half a billion smelt were flushed out of Lake Oahe. The net result was that fishermen stayed away and the State lost revenue. If this year's smelt spawn is similarly decimated, the State stands to lose millions of dollars, as do the many communities and businesses who rely on Lake Oahe walleye fishing for their economic livelihood.

The court, in considering the irreparable harm to the State, is mindful of the undisputed evidence that this year has the likely potential to be very positive from a smelt production standpoint, This is due, in part, to the natural cycles of smelt production as well as the efforts taken by the state to lower the number of walleye in Lake Oahe in an attempt to halt the smelt population recover. Thus, if this year's smelt population is decimated, the combination of the State's efforts and the fortuitous turns of this year's advantageous smelt cycle will be lost. Thus, the State not only stands to lose several millions of dollars this year, but stands to lose millions more in the years to come.

The Corps will not suffer any harm if the court orders a temporary restraining order. As a regulatory entity, it stands to lose nothing.[2] All it would be required to do is maintain water levels on Lake Oahe for a short period of time pending the hearing on the application for a preliminary injunction which hearing will begin on Thursday, May 9, five working days from today. Given the capabilities of the Corps, it would be able to adhere to the court's order quickly and without serious disruption to its operations.[3] Thus, this factor, when weighed with the harm that

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[2] In its submissions to the court, the Corps included several affidavits from those associated with the barge industry, warehouse industry, docking industry, and other navigation related industries. None of those entities are parties to this action. Thus, any harm that the court's temporary restraining order could cause them is more correctly considered under the public interest factor.

[3] The court has no interest to run the Corps or tell it how to operate. All it is enjoined from doing is lowering Lake Oahe. How it accomplishes that, i.e., releasing more water from other reservoirs or reducing the amount of water going south from Sioux City, is not before the court today.

the State would suffer, counsels in favor of the temporary restraining order.

The likelihood that the State will succeed on the merits is sufficient given the amount the State would lose if the temporary restraining order is not granted. As the Eighth Circuit stated in *Dataphase*, the showing of success on the merits may be less if the other factors weigh heavily in favor of the injunction. *Id.* Here, the State advances two arguments on the merits. First, the State argues that the doctrine of judicial estoppel applies in this case, prohibiting the Corps from not honoring its assurances in the 1991 Montana litigation that it would consider all water uses equally. The State makes a convincing preliminary argument that the Corps, in deciding to let millions of smelt die, is arbitrarily and capriciously favoring navigation over recreation, fish and wildlife. This is especially true given the State's request that the water level on Lake Oahe not be lowered for a very short time. The Corps' refusal to meet that request does raise an issue of whether it is favoring navigation over recreation, fish and wildlife. If it is, the doctrine of judicial estoppel may apply. Thus, on this issue, the State has made a sufficient showing. It raises a substantial question, at least at this early junction, one that could well be resolved in its favor.

Additionally, the State argues that the Corps' decision to cause the death of millions of smelt, effectively ruining the State's Lake Oahe walleye production, in favor of downstream navigation is an unreasonable and arbitrary decision under the administrative Procedures Act, 5 U.S.C. § 706. The State argues that the Corps' interpretation of the Master Manual is erroneous and that its refusal to consider the dramatic shifts in both navigation and recreation, fish and wildlife is arbitrary and capricious.

Again, the State has made a sufficient showing at this early stage of the proceedings. Of particular importance is the following language from the 1979 Master Manual: "insofar as possible without serious interference with the foregoing functions, the reservoirs will be operated for maximum benefit to recreation, fish and wildlife." The court concludes at this early juncture that serious questions surround both whether "serious interference" would be caused by maintaining Lake Oahe's current level for a very short period and whether the Corps' decision gives the "maximum benefit" to recreation, fish and wildlife, especially in light of the evidence of a declining barge industry and a greatly expanding recreation, fish and wildlife industry. Thus, for purposes of the temporary restraining order, the court concludes that the State has sufficiently demonstrated its likely success on the merits. Given the size of the harm facing the State, the court concludes that the water level should be maintained pending a hearing on the preliminary injunction request.[4]

Given the extensive consideration to the merit's issue by both parties and to the incredible interest expressed in it as well by various states, interest groups, and others who tried to participate as either amicus or as intervenors, the court feels compelled to state that this determination is preliminary only. The court, in addressing the merits issue for purposes of the temporary restraining order, was

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[4] The Corps argues at length that the State cannot succeed on the merits. In focusing so intently on the merits, however, the Corps overlooks the fact that if the movant has raised a substantial question and the equities are otherwise strongly in its favor, the showing of success on the merits can be less. *See Dataphase*, 640 F.2d at 113. The other factors weigh heavily in favor of the State in this case.

required to "peek under the tent" and see if enough was there warranting the extraordinary remedy of the temporary restraining order. Because the other factors weigh heavily in favor of the State, the court concludes that enough is there on the merits to support a temporary restraining order. Whether the State will ultimately prevail on the merits is a decision for another day. Nothing in the temporary restraining order analysis requires sure success on the merits. At this early stage, the court finds that the State has demonstrated enough to justify the temporary restraining order.

The final consideration is the public interest. As with beauty, the public interest is in the eye of the beholder. For the thousands of people who depend on the fishing industry in Lake Oahe, the public interest is obvious. Similarly, for the barge owners and others downstream, the public interest is equally obvious. There is only a finite amount of Missouri river water. The southern basin states want more of it; the northern basin states want more of it. Each wants it for their own legitimate reasons. Despite such obvious tension, the court concludes that the public interest would be best served in this case by granting the temporary restraining order. Barge traffic could be impacted, if at all, for one week at this point. However, there has been no significant impact thus far and no evidence that there will be any. The State, however, would be negatively impacted for years to come. The time component necessarily resolves the public interest factor in favor of the State. Under the circumstances, equity commands that those downstream possibly wait a short period rather than have those upstream financially devastated for years to come. Thus, this factor also weighs in favor of the temporary restraining order.

The court is not unmindful of the many affidavits submitted by the Corps from those dependent upon the barge industry and other water users. The temporary restraining order may or may not impact their operations. It must be remembered that nothing in the court's order requires the Corps to "turn off the water" flowing south. The Corps is only temporarily restrained as to lowering Lake Oahe. If the Corps desires to draw down other reservoirs, it is free to do so. Thus, the economic horrors detailed in those affidavits may well never come to pass. However, if the smelt spawn is decimated, the horrors articulated by the State will surely occur. Thus, this fact supports the court's determination that the public interest would best be served by issuing the temporary restraining order.

Fed.R.Civ.P. 65(c) requires the court to consider whether security shall issue and, if so, in what amount. Although Rule 65(c) allows the district court much discretion in setting a bond, the district court is required to make the necessary findings in support of its determinations. *See Hill v. Xyquad, Inc.*, 939 F.2d 627, 632 (8th Cir. 1991), citing *Rathmann Group v. Tanenbaum*, 889 F.2d 787, 789 (8th Cir. 1989). In this case, the court finds that a bond would serve no useful purpose. The Corps has not articulated any losses it would suffer if the court prevents it from lowering the water level of Lake Oahe. How the defendants choose to maintain the current water level (whether by stopping releases from the Oahe Dam or compensating for those releases from other dams) is at present their affair.

ORDER

Based on the foregoing

IT IS ORDERED that the defendants and each of them are temporarily restrained from reducing the water level of the Oahe Reservoir below the level which the defendants have voluntarily maintained since April 27, 2002, until either further Order of the court or May 11, 2002, whichever first occurs.

Dated this 2nd day of May, 2002.

BY THE COURT:

/s/ Charles B. Kornmann
CHARLES B. KORNMANN
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: /s/ Barbara J Pinkerton
DEPUTY
(SEAL)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

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STATE OF SOUTH DAKOTA, and WILLIAM J. JANKLOW, GOVERNOR,	*	CIV 02-3011
Plaintiffs,	*	PRELIMINARY INJUNCTION
-vs-	*	
LT. COLONEL KURT F. UBBELOHDE, DISTRICT ENGINEER, OMAHA DISTRICT, UNITED STATES ARMY CORPS OF ENGINEERS, and GENERAL DAVID A. FASTABEND, COMMANDER, NW DIVISION, PORTLAND, OREGON	*	(Filed May 14, 2002)
Defendants.	*	

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On April 25, 2002, the State of South Dakota and its current Governor, William J. Janklow (collectively "the State"), initiated this action seeking a temporary restraining order, preliminary injunctive relief, declaratory relief, and a permanent injunction prohibiting the defendants (collectively "the Corps") from continuing to lower the water level on Lake Oahe in South and North Dakota during the rainbow smelt spawn. This is an extraordinary year of production for smelt, the smelt population having been greatly reduced in recent years, thus starving the walleye population, largely caused by great flushes of water by the defendants, causing the smelt to go through the turbines at Oahe Dam. Walleye, a popular sport fish, primarily feed on rainbow smelt in Lake Oahe. The State

alleged that if Lake Oahe's water level continued to drop as a result of releases by the Corps, the smelt spawn would be decimated, thereby causing irreparable harm to the walleye population in Lake Oahe, and, in turn, causing irreparable economic injury to the State and the various businesses on and around Lake Oahe that are dependent upon Lake Oahe's fishing industry and the annual revenues. Hundreds of other business enterprises "on the way to Oahe" also depend greatly on tourists intent on going fishing at probably the greatest Walleye fishery in the United States. The economic impact to South Dakota from the Missouri River fishing industry runs to up to $51 million per year. There are approximately 100 boat ramps and 67 recreation areas now maintained by the State on the Missouri River in South Dakota. All these allegations are uncontested.

On the same day, April 25, 2002, the court had an informal telephonic conference with representatives of the Corps and the State. During that conference, the Corps agreed to voluntarily maintain Lake Oahe's water level pending a hearing that was then scheduled for May 1, 2002. The Corps, true to their word, succeeded in maintaining Lake Oahe's water levels. However, instead of decreasing the water flow out of Gavin's Point Dam, the Corps immediately began to draw down Lake Francis Case, a Missouri River reservoir in South Dakota just south of Lake Oahe and north of Gavin's Point Dam, also in South Dakota. The daily draw down on Lake Francis Case became and continues to be very significant, namely at an average rate of four to five inches per day. Releases of water from Lake Francis Case, since April 26, 2002, have been of such quantity as to discharge 2,000 cubic feet per second (CFS) above even what the Corps argues is the

minimum needed for downstream navigation, beginning at Sioux City, Iowa. No explanation was provided why the Corps would discharge such quantities of water. The walleye spawn was in progress on Lake Francis Case. Such significant and rapid draw downs have caused great damage and harm to the walleye spawn on Lake Francis Case. Again, all of these facts are undisputed.

The State responded to the draw down of Lake Francis Case with an amended complaint filed on April 30, 2002, the day before the scheduled hearing on the temporary restraining order request for Lake Oahe. The State contended that the Corps' decision to draw down Lake Francis Case, causing the decimation of the walleye spawn, while providing more than ample water for downstream navigation, was further evidence that the Corps arbitrarily and capriciously favored navigation interests over recreation, fish, and wildlife. It is the alleged unlawful, rigid, and never varying favoring of downstream navigation and perhaps other downstream wants or needs over upstream recreation, fish, and wildlife interests that serves to fuel the underlying dispute between the parties. The State attempted to expand the scope of the May 1, 2002, hearing to include Lake Francis Case. The court declined to do so, limiting the issues solely to Lake Oahe, concluding it would be unfair to the Corps to so broaden the hearing with such short notice. On May 2, 2002, the court issued an Order temporarily restraining the Corps from lowering the water level on Lake Oahe. The court then scheduled a preliminary injunction hearing for May 9, 2002, to consider whether the Corps should be preliminarily enjoined from lowering Lake Oahe and whether Lake Francis Case's water level should be similarly maintained. On May 9 and 10, 2002, a rather extensive

evidentiary hearing was held on the preliminary injunction requests. After listening to the evidence, reading the exhibits, considering the affidavits, the briefs, and the applicable law, the court concludes that the Corps should be preliminarily enjoined as detailed below.

DISCUSSION

The legal framework for determining whether to grant a preliminary injunction parallels the analysis used by the court in issuing its temporary restraining order. That framework consists of the following four factors: (1) the threat of irreparable harm to the State; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other litigants; (3) the probability that the State will succeed on the merits; and (4) the public interest. *See Dataphase Systems, Inc. v. C.L. Systems, Inc.*, 640 F.2d 109, 113 (8th Cir. 1981). In reviewing a request for a preliminary injunction, the court is to adopt a flexible approach that will enable it to encompass the particular circumstances of the case. *Id.* In balancing the equities, no single factor listed above is determinative; rather, the court should employ a pragmatic approach, keeping in mind the relative injuries to the parties and the public. *Id.* If the movant has raised a substantial question and the equities are otherwise strongly in its favor, the showing of success on the merits may be less. *Id.*

A. Lake Oahe

The four factors listed above weigh in favor of the preliminary injunction as to Lake Oahe. The court, in issuing the temporary restraining order, considered all of the above factors and concluded that preliminary relief

was warranted. Nothing has changed in the past week to detract from the court's conclusion that preliminary relief is clearly needed. In fact, as discussed below, recent rains in the past week, both in South Dakota and downstream, support the court's decision. Flood conditions in Missouri which have very recently occurred support less release of water to flow south. At Jefferson City, Missouri, c. 200,000 cubic feet per second (CFS) of water is passing. The court will preliminarily enjoin the Corps from further lowering the water level on Lake Oahe (the lake having been lowered substantially by the Corps prior to the filing of this lawsuit) until the smelt spawn and the walleye spawn have been completed, namely until close of business on May 25, 2002.[1] Expanded or additional factors supporting the relief as to Lake Oahe are discussed in the portion of this preliminary injunction dealing with Lake Francis Case.

B. Lake Francis Case

The walleye spawn that was threatened by the Corps' action of lowering Lake Francis Case was set to conclude on May 7, 2002. While that date has passed, causing a significant loss to the walleye spawn, thousands of walleye eggs still do exist and require an eighteen day incubation period. As the State's biologist made clear, if water levels are reduced during the incubation period, the eggs will dry out and die. Thus, while the walleye spawn on Lake Francis Case has concluded, the incubation period has just

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[1] For a more detailed analysis of the *Dataphase* factors and the facts of this case as they relate to Lake Oahe, please see the court's temporary restraining order, Doc. 38.

begun. If the radical draw down of Lake Francis Case continues, the walleye eggs that have survived will die, ensuring the total destruction of the 2002 walleye class. In addition, another popular sport fish, the small mouth bass, is set to now begin its spawn on Lake Francis Case. A continued draw down would doom that spawn, as well as the bait fish population necessary to support the walleye population.

While the fishing industry on Lake Francis Case is not as economically significant as it is on and around Lake Oahe, the destruction of the 2002 walleye class would have devastating effects on South Dakota and the businesses and communities dependent upon Lake Francis Case. While the effects of the destruction would not be immediately felt, they would be realized in approximately three to four years. The postponement of the harm, however, does not alter the court's conclusion that the destruction of this year's walleye class, baitfish class, and bass class would cost the State and Lake Francis Case's dependent communities millions of dollars. The economic value of the fishing industry as to Lake Francis Case is approximately $11.5 million annually. The harm, therefore, for purposes of the preliminary injunction, is real and substantial. It is not in any way speculative. It is also irreversable [sic]. A continued draw down of Lake Francis Case would devastate its fishery and the economic outlook for the businesses and communities that rely upon it. The Corps does not argue about the magnitude of the damages to South Dakota.

The other *Dataphase* factors governing the issuance of preliminary injunctive relief also favor the State. As previously discussed, the Corps will suffer no harm if preliminary injunctive relief is granted. In addition, because any preliminary injunctive relief would extend for

only two weeks, the public interest *Dataphase* factor rather easily resolves in favor of the State. While the court understands that requiring water levels to be maintained on both Lake Oahe and Lake Francis Case may reduce the water available for release from Gavin's Point Dam, the short time period involved significantly lessens any potential harm to downstream water users.[2] Since the issuance of the temporary restraining order, significant rainfall in downstream states, especially Missouri, has caused flood-like conditions, as already discussed. The Corps concedes that water is plentiful in the Missouri River channel from Kansas City to St. Louis. That stretch of the river, therefore, will be totally unaffected by any preliminary injunction. Moreover, a significant majority of the barges on the Missouri are south of Kansas City. There are currently no barges in transit that could possibly be affected. There are thirteen loaded barges that could conceivably be affected but they are all securely moored. If not properly moored, they can easily be better moored. Any reduced water flows, therefore, would produce a minimal impact when compared to the effects that the destruction of two upstream fisheries would produce. The court is also satisfied that maintaining Lake Oahe's and Lake Francis Case's current water levels for two weeks would not significantly adversely impact other downstream users of water. Especially important to the court and the public interest consideration are the many

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[2] The court is not forbidding the Corps from releasing water backed up by Gavin's Point Dam. The Corps is merely forbidden from lowering Lake Oahe and Lake Francis Case until close of business on May 25, 2002. How the Corps chooses to abide by the court's Order and otherwise operate the Missouri River system is its affair.

downstream municipalities that rely on the river for their drinking water. No significant impacts will be produced by a two week reduction in flows, if any such reduction occurs. Electric utility entities, especially those operating nuclear reactors, agree that no disruption in service would result from the court's very limited temporary restraining order. Any impact on downstream users would be minimal. Moreover, the court expressly offered the Corps the opportunity of reconvening in a few days if it desired to further attempt to make a credible showing of any credible and significant ills that the court's Order could cause downstream. The Corps declined that request, even after hearing from the court that the evidence at the hearing of danger to moored barges was speculative at best. Thus, the Corps' suggestion that some barges could be significantly damaged is speculative at best. No evidence was introduced to prove any such speculation. No expert witness was called to so testify, even though the court, as already noted, expressly issued such an invitation to the Corps. In any event, heavy recent rains and their run-offs producing full water level Missouri River tributaries combined with the fact that the Corps is only prohibited from lowering two reservoirs for two weeks, necessarily tips the public interest factor in favor of ordering preliminary injunctive relief. Some problems, including those with endangered species, can and should be mitigated or solved by the Corps without great economic significance, especially in comparison with the losses faced by South Dakota.

Finally, as the court previously determined, the State has made a sufficient showing of its likely success on the merits to warrant the issuance of a preliminary injunction. Both the judicial estoppel claim and the arbitrary and

capricious claim under the Administrative Procedures Act, 5 U.S.C. § 706, raise significant issues. In the judicial estoppel context, it is clear that the Corps has not changed its operation at all since the dismissal of the 1993 Montana litigation. It has continued to completely subordinate the upper basin interests in recreation, fish, and wildlife for the betterment of downstream navigation despite a federal judge's understanding (as set forth in the memorandum opinion) in the Montana litigation that all water uses were to thereafter receive equal consideration, making the case moot. Obviously, if the Corps told the judge in Montana its plans for equal water uses consideration, and did not fulfill those representations, the Corps would be obligated to act exactly as the judge was told. Otherwise, judicial estoppel may well apply. The court does not intend to permit any party, much less the federal government, to play fast and loose with the judicial process. Resolution of that issue, of course, will be determined at a later date. For purposes of preliminary relief, however, the State has made a sufficient showing of its likely success on the merits as it relates to judicial estoppel.

Additionally, the State has made a sufficient showing regarding its claim that the Corps' decision to destroy two upstream fisheries for the benefit of downstream navigation may well be arbitrary and capricious under the Administrative Procedures Act, 5 U.S.C. § 706. From what has been submitted to the court thus far, it is clear that the only goals being addressed are flood control and navigation. Recreation, fish, and wildlife interests are not now being addressed or logically considered. The court believes that this is largely due to the Corps' reliance on out-dated and inaccurate information to guide its operations. All parties concede that the Master Manual is and

has been for years in need of substantial revision. It was written and amended before the fishing industry in South Dakota had become so viable and economically important. It was striking to learn that it is the Corps' position that Lake Oahe would have to be reduced forty feet in depth before downstream navigation would be halted. The court cannot imagine the devastating economic and ecological impact such a significant reduction would produce. Despite that devastation, the declining and little used navigation industry would continue to enjoy business as usual.

Strongly supporting the State's arbitrary and capricious argument is the fact that navigation never has never been required to "take a hit" when water is in short supply. Whenever a water shortage occurs, it is the Corps' practice to require all or some of the upstream states of Montana, North Dakota, and South Dakota to "take the hit." The Corps has followed a consistent practice of permitting or causing the destruction of upstream fisheries, this despite the fact that the fisheries need only a few weeks to produce successful spawns. Despite the modest nature of the upstream states' request that water levels be maintained during that period, the Corps apparently refuses to abide or even properly consider such requests. Instead, navigation receives a full eight month season. Again, it is clear from the evidence that the Corps, in times of low water flows (as a result of drought or little snow melt or both), always chooses to seriously impact upstream states to continue navigation, "come Hell or low water." The more dire the water conditions upstream, the more water that is released for downstream purposes. There is no dispute about this being the Corps policy. It may well be arbitrary and capricious.

Requiring upstream fisheries to shoulder that burden is perhaps made all the more unreasonable in light of the expert testimony received by the court. An economics expert called by the State detailed in a very persuasive and detailed manner the rather meager, if any, economic impact downstream navigation produces. The economic impact of the upstream fisheries, however, continues to grow; Lake Oahe alone outpaces navigation's claimed contributions (and the court believes that these claims are highly overstated) almost three to one. Seven million dollars annually is claimed for navigation compared with Lake Oahe's annual twenty million dollars. The evidence presented was clear that barge traffic has consistently declined greatly, will continue to decline greatly, and is of little, if any, net economic value on the Missouri River. The State's expert effectively showed that the data and studies relied upon by the Corps are not credible and continue to be totally unrealistic as to barge traffic. Later water releases (during the course of the summer and fall) from the upstream dams would benefit barge traffic on the Mississippi River and would result in higher Western Area Power Administration electricity revenues.

The Corps' decision to adhere to navigation's sole interest in a full eight month season at the expense of the few weeks needed by upstream fisheries may well be arbitrary and capricious. Of course, a decision on that issue will come later. For purposes of the preliminary injunction request, the State's showing is easily sufficient.

The Corps gives no consideration to the fact that South Dakota gave up over 530,000 acres of the most productive and valuable farm land in the state to build the dams and flood the land, all of which was and is designed to protect downstream communities from flooding, i.e.

from loss of life and property. South Dakota has forever lost the tax revenue that those acres would have produced. In addition, the promised wide spread irrigation of the James River Valley in South Dakota, an idea that primarily drove the Pick-Sloan Plan, never materialized. While that may have been a blessing in disguise, it is further evidence that South Dakota has received rather little from the dams and has given up much. The primary benefits the dams produce in South Dakota are recreation, fish, and wildlife. Destruction of the fisheries would deprive South Dakota of the remaining benefit from having over a half million of its acres flooded and forever lost. The injunction should issue even without these facts.

It is clear that the State has standing to launch the challenge here. Iowa, Nebraska, and Missouri, in *State of Missouri v. Andrews*, 787 F.2d 270 (8th Cir. 1986), successfully challenged action by the Secretary of Interior and the State of South Dakota attempting to permit water to be moved from the Oahe reservoir to Wyoming for the purpose of a coal slurry pipeline. These states alleged that this action threatened "their right to obtain sufficient quantities of Missouri River water" for certain beneficial purposes and claimed that "the planned depletion would injure fish and wildlife habitats." *Id.* at 276. The district court in Nebraska found, *inter alia*, that the allegations of injury to fish, wildlife habitats, and sewage disposal stated a cause of action under the Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661, 1531. *Id.* at 277. The lower court also held that the states had standing to invoke judicial review of the agencies' allegedly improper conduct under the Administrative Procedure Act, 5 U.S.C. § 701 (1982). *Id.* The Court of Appeals held: "We conclude that the states' allegations of injury to the beneficial uses of Missouri River

Basin water, and to the fish and wildlife habitats which this water supports, meet the injury-in-fact requirement. The appellants' argument that this injury is not fairly traceable to their actions, nor likely to be redressed by our decision today, is unpersuasive." *Id.* It was also noted that the decision by the Court of Appeals "does not address the issue of South Dakota's right, as against other states and the federal government, to allocate waters within its borders. This issue was not presented to us and South Dakota is not a party to this case." *Id.* (FN 5).

Another issue before the Court of Appeals in 1986 was the impact of Section Six of the Flood Control Act of 1944, 33 U.S.C. 708 (1982). This provides: "That the Secretary of War is authorized to make contracts with States, municipalities, private concerns, or individuals, at such prices and on such terms as he may deem reasonable, for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the War Department: *Provided*, That no contracts for such water shall adversely affect then existing lawful uses of such water . . . " The appellants argued that the three States were not within the class of users whose interests are protected under Section Six. The answer was provided: "We do not think that this language must be read so narrowly. Section 6 of the Act evinces an intent to protect the interests of established users of Missouri River Basin water by ensuring that the Army considers their needs when determining whether there is *surplus water* available for industrial use. The states are current lawful users of Missouri River Basin water." *Id.* at 278 (emphasis supplied).

It is clear that there is, as to the upstream states, no "surplus water" available for industrial use at this stage of

2002. Questions of law and of fact remain to be resolved as to the implications of all of this. It is also clear that South Dakota is a current lawful user of Missouri River Basin water. It remains to be seen whether the rights of existing users have been preserved. It would appear, at this stage, that they have not been.

Fed.R.Civ.P. 65(c) requires the court to consider whether security shall issue and, if so, in what amount. Although Rule 65(c) allows the district court much discretion in setting a bond, the district court is required to make the necessary findings in support of its determinations. *See Hill v. Xyquad, Inc.*, 939 F.2d 627, 632 (8th Cir. 1991), citing *Rathmann Group v. Tanenbaum*, 889 F.2d 787, 789 (8th Cir. 1989). In this case, the court finds that a bond would serve no useful purpose. The Corps has not articulated any losses it would suffer if the court enters the preliminary injunction. How the defendants choose to maintain the current water level (whether by reducing releases from the Gavin's Point Dam or compensating for those releases from other dams) is at present their affair.

ORDER

Based on the foregoing,

IT IS ORDERED

(1) That the defendants and each of them are preliminarily enjoined from reducing the water level of the Oahe Reservoir below the level which the defendants have voluntarily maintained since April 27, 2002, until either further Order of the court or close of business on May 25, 2002, whichever first occurs.

(2) That the defendants and each of them are preliminary enjoined from reducing the water level on Lake Francis Case below its current level until either further Order of the court or close of business on May 25, 2002, whichever first occurs.

(3) No bond is required pursuant to Fed.R.Civ.P. 65(c).

Dated this 13th day of May, 2002.

BY THE COURT:

/s/ Charles B. Kornmann
CHARLES B. KORNMANN
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: /s/ Jill Bowers
DEPUTY
(SEAL)

UNITED STATES DISTRICT COURT

DISTRICT OF NORTH DAKOTA

SOUTHWESTERN DIVISION

STATE OF NORTH DAKOTA, and JOHN HOEVEN, GOVERNOR, Plaintiffs, v. LT. COLONEL KURT F. UBBELOHDE, DISTRICT ENGINEER, OMAHA DISTRICT, UNITED STATES ARMY CORPS OF ENGINEERS, and GENERAL DAVID A. FASTABEND, COMMANDER, NW DIVISION, PORTLAND, OREGON, Defendants.	Civ. No. A1-02-059 (Filed May 12, 2002)

Plaintiffs filed an application for a temporary restraining order and motion for preliminary injunction. The Court has reviewed the Application, the Complaint, and the Supporting Brief, and HEREBY ORDERS:

That the defendants, and each of them, are temporarily restrained from reducing the water level of Lake Sakakawea below 1,827.6 msl, for a period of 10 days after the date of entry of this order (unless extended by order of the court) or, until further order of this court, whichever comes first.

Dated this 12 of May, 2002.

By the Court:

/s/ Patrick A. Conmy
Patrick A. Conmy
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

STATE OF NORTH DAKOTA and JOHN HOEVEN, GOVERNOR, Plaintiffs, v. LT. COLONEL KURT F. UBBELOHDE, DISTRICT ENGINEER, OMAHA DISTRICT, UNITED STATES ARMY CORPS OF ENGINEERS, and GENERAL DAVID A. FASTABEND, COMMANDER, NW DIVISION, PORTLAND, OREGON, Defendants.	Civ. No. A1-02-059 STIPULATION

1. On May 12, 2002, the Court entered a Temporary Restraining Order restraining Defendants "from reducing the water level of Lake Sakakawea below 1,827.6 msi, for a period of 10 days . . . (unless extended by order of the court) or, until further order of this court, whichever comes first."

2. The Defendants have filed a Notice of Appeal with the Eighth Circuit seeking review of the Court's May 12, 2002. Temporary Restraining Order. They have also appealed preliminary injunction orders issued by District Courts in South Dakota and Nebraska. The Defendants

have also filed with the Court of Appeals an "Emergency Motion for Stay Pending Appeal or in the Alternative, for Expedited Briefing of Appeals." The motion seeks to stay all the orders, including this Court's Temporary Restraining Order.

3. The Court has scheduled a hearing for May 20, 2002, on Plaintiffs' request for a preliminary injunction.

4. The parties have been discussing an interim settlement of their dispute and agree as follows:

a. That a preliminary injunction may be granted effective through May 25, 2002.

b. There is no longer a need for the scheduled hearing on May 20, 2002, and this stipulation can be considered a joint request to the Court that the hearing be cancelled.

c. That the Defendants, Until May 25, 2002 will prior to making releases from Lake Sakakawea to satisfy ESA listed birds, consider all of its other alternatives to protecting listed birds.

D. All Parties reserve all of their rights on appeal of the Order of May 12, 2002 to the United States Court of Appeals for the Eighth Circuit.

Dated this 17th day of May, 2002.

State of North Dakota
Wayne Stenehjern
Attorney General

/s/ Wayne Stenehjern
Wayne Stenehjern
Attorney General
State Bar ID No. 03442
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THOMAS L. SANSONETTI
Assistant Attorney General

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

State of North Dakota, and
John Hoeven, Governor,

Plaintiffs,

-v- A1-02-059

Colonel Kurt F. Ubbelohde,
District Engineer, et al

Defendants.

MEMORANDUM AND ORDER

Without regard to the legal issues presented, it appears that the Federal Courts have no place in the management of the Missouri/Mississippi river system.

South Dakota sued to stop the reduction of the water levels in lake Oahe after the Corps apparently agreed with a request to provide a greater river flow through the State of Nebraska so that 4 barges could be moved.

District Judge Kornmann ordered that Oahe be maintained at a specified level, so that Corp began draining another South Dakota lake deemed vital by South Dakota game and fish officials in the sport fishing food chain. Judge Kornmann amended his order to prevent further depletion of this lake. Nebraska moved to intervene in the South Dakota case, which intervention was denied by Judge Kornmann.

The Corps responded by announcing that it would not reduce the releases from Lake Oahe, but would solve the problem by beginning to drain the already badly depleted

lake Sakakawea, thus compensating for the continued high level of releases from lake Oahe.

North Dakota entered the fray, and I signed a temporary restraining order requiring that the lake level in North Dakota be maintained at a level deemed necessary to protect the spawn and hatch of smelt, a vital food source for the game fish in the lake, but limited to the relatively brief period of time deemed necessary.

The Corps responded in typical fashion, announcing that it would drain Montana's drought stricken reservoirs, which, not surprisingly, resulted in the State of Montana obtaining a court order prohibiting such action.

Not to be outdone, Nebraska obtained an order requiring the Corps to keep a sufficient water flow for the four barges whose presence threatened the destruction of the sports fishing industry in the Dakotas, an industry which dwarfs the barge presence in economic impact.

The only things missing from the scenario are the absence of Court orders from Missouri and Illinois ordering the Corps to stop all flows which would worsen the flood stage levels of the river system at St. Louis.

I have not attempted an accurate count, but if we run the system all the way past New Orleans, we could have involved many Federal Court Districts and multiple Appellate Court Circuits. As is apparent, the interest of the various States are sharply divergent, and the Corps seems to have mastered the art of playing one against the other so as to maintain unfettered autonomy. Unfortunately, from the perhaps parochial viewpoint of the various states, it appears that at times the bureaucratic idiocy displayed borders on terrorism.

The solution to these continuing problems has to be political rather than judicial. Judge Kornmann may indeed be correct in his analysis that the District Courts do have both the jurisdiction and authority to entertain and grant applications for temporary injunctions, but I question the wisdom of the exercise of that authority, if in fact possessed. The crisis has been resolved through the cooperative efforts of the respective Governors and the Corps. This is as it should be. The parties have filed a stipulation to the effect that the temporary restraining order previously issued shall be replaced by a temporary injunction requiring the maintaining of the lake level through the 25th of May, 2002, subject to the following condition "that the defendants, until May 25, 2002 will, prior to making releases from Lake Sakakawea to satisfy ESA listed birds, consider all of its other alternatives to protecting listed birds."

Pursuant to the stipulation of the parties, the Court orders that the TRO be replaced at its scheduled expiration with a temporary injunction as provided in the stipulation of the parties filed herein.

Dated this 20th day of May, 2002.

/s/ Patrick A. Conmy
Patrick A. Conmy
Judge of the District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

STATE OF MONTANA, and JUDY MARTZ, GOVERNOR, Plaintiffs, v. LT. COLONEL KURT F. UBBELOHDE, DISTRICT ENGINEER, OMAHA DISTRICT, UNITED STATES ARMY CORPS OF ENGINEERS, and GENERAL DAVID A. FASTABEND, COMMANDER, NW DIVISION, PORTLAND, OREGON, Defendants.	CIV. CV-02-70-B16-RFC TEMPORARY RESTRAINING ORDER (Filed May 13, 2002)

The State of Montana and its Governor, Judy Martz (collectively "the State"), instituted the above-entitled action pursuant to Fed.R.Civ.P. 65 against the United States Army Corps of Engineers ("The Corps"), and seek a temporary restraining order to not increase releases from Ft. Peck Reservoir to make up for water that cannot be released from two South Dakota reservoirs pursuant to a preliminary injunction granted on May 10, 2002, by the United States District Court for the District of South Dakota, Central Division, *State of South Dakota, et al. v. Lt. Colonel Kurt F. Ubbelohde, et al.*, (Civ. No. 02-3011) (Complaint filed April 30, 2002), and to make up for water that cannot be released from Lake Sakakawea pursuant to a temporary restraining order granted on May 12, 2002,

by the United States District Court for the District of North Dakota, Southwestern Division, *State of North Dakota, et al. v. Lt. Colonel Kurt F. Ubbelohde, et al.*, (Civ. No. A1-02-059) (Filed May 12, 2002).

On May 10, 2002, as a result of the restraining order issued in South Dakota, the Corps announced that releases from Ft. Peck Dam in Montana would increase from the current 4,000 cubic feet per second to 6,000 cubic feet per second on May 11, 2002, and to 9,000 cubic feet per second on May 11, 2002. The level at Ft. Peck Lake will fall 6 inches to 2218 feet above mean sea level by May 25, 2002. On May 13, 2002, as a result of the temporary restraining order issued in North Dakota, additional releases have been ordered from Ft. Peck Reservoir. Montana has filed affidavits showing that due to drought conditions prevailing in the State over the past three years and the unanticipated increase in releases from Ft. Peck announced by the Corps that Montana will suffer irreparable injury to the fishery at Ft. Peck and a resultant adverse impact to the local economy.

Notice is not required to be given because of the exigent circumstances created by the States of South Dakota and North Dakota acquiring restraining orders on Friday and Sunday, thereby leaving only the waters of Ft. Peck Reservoir available to maintain the levels at the two lower states' reservoirs unless the water is taken from navigation.

GOOD CAUSE having been shown,

IT IS ORDERED that the above Defendants are hereby restrained from increasing releases from Ft. Peck Reservoir beyond the planned releases in the Corps' "Three Week Main Stem Regulation Forecast" dated May

7, 2002, for a period of 10 days after the date of entry of this order, unless extended by order of the Court) or, until further order of this Court, whichever comes first.

DATED this 13th day of May 2002 at 4:35 o'clock, p.m.

/s/ Richard F. Cebull
District Judge Richard F. Cebull
United States District Judge

[SEAL]

UNITED STATES OF AMERICA }
DISTRICT OF MONTANA } SS.

I, PATRICK E. DUFFY, Clerk of the United States District Court for the District of Montana, hereby certify that the above and foregoing is a true copy of the original hour on file in my office.

Dated this 13 day of May, 2002
PATRICK E. DUFFY Clerk

By /s/ Christine Rost
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

STATE OF NEBRASKA ex rel. DON STENBERG, ATTORNEY GENERAL FOR THE STATE OF NEBRASKA, **Plaintiff,** **vs.** **LT. COLONEL KURT F. UBBELOHDE, DISTRICT ENGINEER, OMAHA DISTRICT, UNITED STATES ARMY CORPS OF ENGINEERS, and GENERAL DAVID FASTABEND, COMMANDER, NW DIVISION, PORTLAND, OREGON,** **Defendants.**	**CASE NO. 8:02CV217** **MEMORANDUM AND ORDER ON MOTION FOR PRELIMINARY INJUNCTION** (Filed May 13, 2002)

This matter is before the Court upon the Application for a Temporary Restraining Order sought by the Plaintiff, the State of Nebraska (Filing No. ___). The State of Nebraska is seeking injunctive relief against the United States army Corps of Engineers, Lt. Colonel Kurt F. Ubbelohde of the Corps' Omaha District and General David Fastabend of the Corps' Northwest Division (hereafter the "Corps" or "Corps of Engineers"). The Corps of Engineers received advance notice of the hearing on the application, which was conducted on May 13, 2002. All parties were represented by counsel, and each had an opportunity to submit evidence and make oral argument

to the Court. Exhibits A through H were received and have been considered. The requirements of Fed. R. Civ. P. 65 have been satisfied. The parties agreed that the matter would be submitted as an Application for a Preliminary Injunction.

Congress authorized the construction and operation of the Missouri River Mainstem System of Reservoirs for flood control, hydropower, irrigation, recreation, navigation, water supply and water quality, and fish and wildlife, primarily pursuant to the 1944 Flood Control Act. A drought that has adversely affected many States in the central United States, and the Corps of Engineer's response to the drought, are at the center of this dispute. The State of Nebraska contends that if the Corps of Engineers fails to release water from the Missouri River Mainstem reservoirs as required by the Corps' 1979 Master Manual and the Corps' current Annual Operating Plan, then flows on the Missouri River will fall to 13,000 cubic feet per second. If the flow falls to that level, Nebraska contends that it will suffer irreparable harm. The Corps of Engineers opposes the motion to the extent that the State of Nebraska is seeking to limit the Corps' discretion in handling this situation.

In determining whether preliminary injunctive relief should issue, this Court must consider the factors set forth in *Dataphase Systems, Inc. v. CL, Sys., Inc.,* 640 F.2d 109, 114 (8th Cir. 1981) (en banc). The Eighth Circuit Court has summarized those factors as follows:

> When considering a motion for a preliminary injunction, a district court weighs the movant's probability of success on the merits, the threat of

> irreparable harm to the movant absent the injunction, the balance between the harm and the injury that the injunction's issuance would inflict on other interested parties, and the public interest. *Dataphase System, Inc. v. CL, Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc). We reverse the issuance of a preliminary injunction only if the issuance "is the product of an abuse of discretion or misplaced reliance on an erroneous legal premise." *City of Timber Lake v. Cheyenne River Sioux Tribe,* 10 F.3d 554, 556 (8th Cir. 1993) *cert. denied* 512 U.S. 1236, 114 S. Ct. 2741, 129 L.Ed.2d 861 (1994).

Pottgen v. Missouri State High Sch. Activities Ass'n., 40 F.3d 926, 929 (8th Cir. 1994). The burden of establishing the propriety of a preliminary injunction is on the movant. *Baker Elec. Co-op, Inc. v. Chaske*, 28 F.3d 1466, 1472 (8th Cir. 1994); *Modem Computer Sys., Inc., v. Modem Banking Sys., Inc.*, 871 F.2d 734, 737 (8th Cir. 1989) (en banc). "No single [Dataphase] factor in itself is dispositive; in each case all of the factors must be considered to determine whether on balance they weigh towards granting the injunction." *Baker Elec. Co-op,* 28 F.3d at 1472 (quoting *Calvin Klein Cosmetic Corp., v. Lenox Labs, Inc.*, 815 F.2d 500, 503 (8th Cir. 1987), and also citing *Dataphase.*

The parties disagree on whether Nebraska is likely to succeed on the merits of this case. The parties do acknowledge that the Corps is in immediate jeopardy of being forced to deviate from its 1979 Master Manual and current Annual Operating Plan. Nebraska makes a worthy case that under federal law, the Corps is required to abide by the 1979 Master Manual and its current Annual Operating Plan, and that if the Corps refuses or is restrained

from abiding by these plans, then the State of Nebraska will suffer irreparable harm.

Nebraska contends that if the Corps allows the Missouri River flow to fall to 13,000 cubic feet per second, Nebraska will suffer irreparable harm. For example, Nebraska has stated that prolonged reduced flows at that level will cause four major power plants in Nebraska to curtail or cease operations in order to comply with the plants' thermal discharge permits. In addition, Nebraska contends that a reduction in the flow will create a significant safety hazard by stranding barges traveling on the Missouri River, which may in turn cause barges to crack and discharge potentially dangerous or toxic substances into the river. Nebraska fisheries will suffer irreparable injury due to reduced flows because May and June are critical spawning months and reduced flows will prevent normal spawning. Wildlife will also be irreparably harmed. A threatened bird species, the piping plover, is likely to begin nesting next week along the Missouri River, and if the river's flow is significantly decreased, the birds may nest on sand bars in the river that are usually covered with water. Once the birds have nested, the Corps will need to take extraordinary measures to remove the birds if the water level rises. Alternatively, the Corps may be prevented from increasing the flow of the river until the chicks have sufficiently matured. In addition to the piping plover, a federally-listed endangered species, the least tern, will begin nesting in the area in early June and may be threatened by a dramatic increase or decrease in the river flow. The Corps of Engineers concedes that Nebraska is under a threat of irreparable harm to the navigability of the river along its border if the State of Montana succeeds in obtaining an injunction prohibiting the Corps from

releasing water from Fort Peck Lake, one of the main reservoirs on the system.

In considering the balance between the harm and the injury that the injunction's issuance would inflict on other interested parties to the action, the Court is mindful of the impact on the discretion of the Corps of Engineers and on other States and water users. While the Corps of Engineers may be hampered in the administration of its responsibilities were an injunction to issue, the Corps itself would not be harmed. On the other hand, absent injunctive relief, Nebraska has made a compelling showing that it will be [sic] surely be harmed.

The interest of Nebraska and its citizens has been comprehensively presented to this Court. There are, however, other States that will be affected if the Court decides to grant the injunctive relief Nebraska seeks. For example, the States of Missouri, Iowa and Kansas also have interests that will be affected by the issuance of a preliminary injunction. In this instance, the court believes that the interests of the States at the downstream end of the Missouri River Basin will be served, not hindered, by the Court's action in this case. While upstream States and water users may not benefit from the issuance of the preliminary injunction, they will have the continued benefit of the equitable allocation of water resources mandated by the 1979 Master Manual and Annual Operating Plan.

In deciding this issue, the Court acknowledges that, when there is a drought in the central United States, those States that rely on water from the Missouri River Basin are harmed. Compliance with a systematic plan, developed with the competing and legitimate interests of

all the water users in mind, is the best way to avoid or minimize irreparable harm during such periods of drought. Through the Flood Control Act of 1944, Congress authorized the Corps of Engineers to develop a systemic plan to address the extremes of drought and flood wrought by nature. This court is reluctant to interfere with the discretion of the Corps, but must recognize that court orders in other jurisdictions designed to safeguard interests of upstream water users are quickly stripping the Corps of Engineers of its ability to function as an objective steward of the water flows in the Missouri River Basin. Undoubtedly, the interests of the parties competing for access to limited water supplies, and the preservation of the Corps' independence to manage the water flows, will be resolved in an appellate court where all interested parties from all affected jurisdictions may be represented and heard. At this time, this Court must recognize that the Plaintiff will suffer irreparable harm if the Corps fails to release water from the Missouri River Mainstem reservoirs as required by the 1979 Master Manual and current Annual Operating Plan.

The Court concludes that the four *Dataphase* factors favor issuance of injunctive relief. Accordingly,

IT IS ORDERED:

1. Plaintiff's Application for a Temporary Restraining Order (Filing No.___) is denied in part and granted in part.

2. Defendants shall operate the Mainstem Reservoirs in accordance with the 1979 Master Manual and current Annual Operating Plan; and

3. Defendants shall operate the Mainstem Reservoirs so as to maintain the minimum navigation flows below

Gavins Point Dam as identified in the 1979 Master Manual and current Annual Operating Plan.

Dated this 13th day of May, 2002.

BY THE COURT:
/s/ Laurie Smith Camp
Laurie Smith Camp
United States
District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 02-2133/2144/2185/2187/2191/2305

State of South Dakota, et al.,	*	
Appellees,	*	Order Denying Petition for Rehearing and for Rehearing En Banc
v.	*	
Mo-Ark Association, et al.,	*	
Appellants.	*	

The petitions for rehearing en banc are denied. The petitions for rehearing by the panel are also denied.

Judge Bye would grant the petition for rehearing en banc.

(5128-010199)

September 30, 2003

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

58 STAT.] 78TH CONG., 2D SESS. –
CHS. 662-665 – DEC. 22, 1944

* * *

[CHAPTER 665]

AN ACT

Authorizing the construction of certain public works on rivers and harbors for flood control, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, In connection with the exercise of jurisdiction over the rivers of the Nation through the construction of works of improvement, for navigation or flood control, as herein authorized, it is hereby declared to be the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control, as herein authorized to preserve and protect to the fullest possible extent established and potential uses, for all purposes, of the waters of the Nation's rivers; to facilitate the consideration of projects on a basis of comprehensive and coordinated development; and to limit the authorization and construction of navigation works to those in which a substantial benefit to navigation will be realized therefrom and which can be operated consistently with appropriate and economic use of the waters of such rivers by other users.

In conformity with this policy:

(a) Plans, proposals, or reports of the Chief of Engineers, War Department, for any works of improvement for navigation or flood control not heretofore or herein authorized,

shall be submitted to the Congress only upon compliance with the provisions of this paragraph (a). Investigations which form the basis of any such plans, proposals, or reports shall be conducted in such a manner as to give to the affected State or States, during the course of the investigations, information developed by the investigations and also opportunity for consultation regarding plans and proposals, and, to the extent deemed practicable by the Chief of Engineers, opportunity to cooperate in the investigations. If such investigations in whole or part are concerned with the use or control of waters rising west of the ninety-seventh meridian, the Chief of Engineers shall give to the Secretary of the Interior, during the course of the investigations, information developed by the investigations and also opportunity for consultation regarding plans and proposals, and to the extent deemed practicable by the Chief of Engineers, opportunity to cooperate in the investigations. The relations of the Chief of Engineers with any State under this paragraph (a) shall be with the Governor of the State or such official or agency of the State as the Governor may designate. The term "affected State or States" shall include those in which the works or any part thereof are proposed to be located; those which in whole or part are both within the drainage basin involved and situated in a State lying wholly or in part west of the ninety-eighth meridian; and such of those which are east of the ninety-eighth meridian as, in the judgment of the Chief of Engineers, will be substantially affected. Such plans, proposals, or reports and related investigations shall be made to the end, among other things, of facilitating the coordination of plans for the construction and operation of the proposed works with other plans involving the waters which would be used or controlled by such proposed works. Each report submitting any such plans or

proposals to the Congress shall set out therein, among other things, the relationship between the plans for construction and operation of the proposed works and the plans, if any, submitted by the affected States and by the Secretary of the Interior. The Chief of Engineers shall transmit a copy of his proposed report to each affected State, and, in case the plans or proposals covered by the report are concerned with the use or control of waters which rise in whole or in part west of the ninety-seventh meridian, to the Secretary of the Interior. Within ninety days from the date of receipt of said proposed report, the written views and recommendations of each affected State and of the Secretary of War shall transmit to the Congress, with such comments and recommendations as he deems appropriate, the proposed report together with the submitted views and recommendations of affected States and of the Secretary of the Interior. The Secretary of War may prepare and make said transmittal any time following said ninety-day period. The letter of transmittal and its attachments shall be printed as a House or Senate document.

(b) The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes.

(c) The Secretary of the Interior, in making investigations of and reports on works for irrigation and purposes incidental thereto shall, in relation to an affected State or States (as defined in paragraph (a) of this section), and to

the Secretary of War, be subject to the same provisions regarding investigations, plans, proposals, and reports as prescribed in paragraph (a) of this section for the Chief of Engineers and the Secretary of War. In the event a submission of views and recommendations, made by an affected State or by the Secretary of War pursuant to said provisions, sets forth objections to the plans or proposals covered by the report of the Secretary of the Interior, the proposed works shall not be deemed authorized except upon approval by an Act of Congress; and subsection 9(a) of the Reclamation Project Act of 1939 (53 Stat. 1187) and subsection 3(a) of the Act of August 11, 1939 (53 Stat. 1418), as amended, are hereby amended accordingly.

SEC. 2. That the words "flood control" as used in section 1 of the Act of June 2, 1936, shall be construed to include channel and major drainage improvements, and that hereafter Federal investigations and improvements of rivers and other waterways for flood control and allied purposes shall be under the jurisdiction of and shall be prosecuted by the War Department under the direction of the Secretary of War and supervision of the Chief of Engineers, and Federal investigations of watersheds and measures for run-off and water-flow retardation and soil-erosion prevention on watersheds shall be under the jurisdiction of and shall be prosecuted by the Department of Agriculture under the direction of the Secretary of Agriculture, except as otherwise provided by Act of Congress.

SEC. 3. That section 3 of the Act approved June 22, 1936 (Public, Numbered 738, Seventh-fourth Congress), as amended by section 2 of the Act approved June 28, 1938 (Public, Numbered 761, Seventy-fifth Congress), shall apply to all works authorized in this Act, except that for

any channel improvement or channel rectification project provisions (a), (b), and (c) of section 3 of said Act of June 22, 1936, shall apply thereto, and except as otherwise provided by law: *Provided*, That the authorization for any flood-control project herein adopted requiring local cooperation shall expire five years from the date on which local interests are notified in writing by the War Department of the requirements of local cooperation, unless said interests shall within said time furnish assurances satisfactory to the Secretary of War that the required cooperation will be furnished.

SEC. 4. The Chief of Engineers, under the supervision of the Secretary of War, is authorized to construct, maintain, and operate public park and recreational facilities in reservoir areas under the control of the War Department, and to permit the construction, maintenance, and operation of such facilities. The Secretary of War is authorized to grant leases of lands, including structure or facilities thereon, in reservoir areas for such periods and upon such terms as he may deem reasonable: *Provided*, That preference shall be given to Federal, State, or local governmental agencies, and licenses may be granted without monetary consideration, to such agencies for the use of areas suitable for public park and recreational purposes, when the Secretary of War determines such action to be in the public interest. The water areas of all such reservoirs shall be open to public use generally, without charge, for boating, swimming, bathing, fishing, and other recreational purposes, and ready access to and exit from such water areas along the shores of such reservoirs shall be maintained for general public use, when such use is determined by the Secretary of War not to be contrary to the public interest, all under such rules and

regulations as the Secretary of War may deem necessary. No use of any area to which this section applies shall be permitted which is inconsistent with the laws for the protection of fish and game of the State in which such area is situated. All moneys received for leases or privileges shall be deposited in the Treasury of the United States as miscellaneous receipts.

SEC. 5. Electric power and energy generated at reservoir projects under the control of the War Department and in the opinion of the Secretary of War not required in the operation of such projects shall be delivered to the Secretary of the Interior, who shall transmit and dispose of such power and energy in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles, the rate schedules to become effective upon confirmation and approval by the Federal Power Commission. Rate schedules shall be drawn having regard to the recovery (upon the basis of the application of such rate schedules to the capacity of the electric facilities of the projects) of the cost of producing and transmitting such electric energy, including the amortization of the capital investment allocated to power over a reasonable period of years. Preference in the sale of such power and energy shall be given to public bodies and cooperatives. The Secretary of the Interior is authorized, from funds to be appropriated by the Congress, to construct or acquire, by purchase or other agreement, only such transmission lines and related facilities as may be necessary in order to make the power and energy generated at said projects available in wholesale quantities for sale on fair and reasonable terms and conditions to facilities owned by the Federal Government, public bodies, cooperatives, and

privately owned companies. All moneys received from such sales shall be deposited in the Treasury of the United States as miscellaneous receipts.

SEC. 6. That the Secretary of War is authorized to make contracts with States, municipalities, private concerns, or individuals, at such prices and on such terms as he may deem reasonable, for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the War Department: *Provided*, That no contracts for such water shall adversely affect then existing lawful uses of such water. All moneys received from such contracts shall be deposited in the Treasury of the United States as miscellaneous receipts.

SEC. 7. Hereafter, it shall be the duty of the Secretary of War to prescribe regulations for the use of storage allocated for flood control or navigation at all reservoirs constructed wholly or in part with Federal funds provided on the basis of such purposes, and the operation of any such project shall be in accordance with such regulations: *Provided*, That this section shall not apply to the Tennessee Valley Authority, except that in case of danger from floods on the Lower Ohio and Mississippi Rivers the Tennessee Valley Authority is directed to regulate the release of water from the Tennessee River into the Ohio River in accordance with such instructions as may be issued by the War Department.

SEC. 8. Hereafter, whenever the Secretary of War determines, upon recommendation by the Secretary of the Interior that any dam and reservoir project operated under the direction of the Secretary of War may be utilized for irrigation purposes, the Secretary of the Interior is authorized to construct, operate, and maintain, under the

provisions of the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and acts amendatory thereof or supplementary thereto), such additional works in connection therewith as he may deem necessary for irrigation purposes. Such irrigation works may be undertaken only after a report and findings thereon have been made by the Secretary of the Interior as provided in said Federal reclamation laws and after subsequent specific authorization of the Congress by an authorization Act; and, within the limits of the water users' repayment ability such report may be predicated on the allocation to irrigation of an appropriate portion of the cost of structures and facilities used for irrigation and other purposes. Dams and reservoirs operated under the direction of the Secretary of War may be utilized hereafter for irrigation purposes only in conformity with the provisions of this section, but the foregoing requirement shall not prejudice lawful uses now exisiting [sic]: *Provided*, That this section shall not apply to any dam or reservoir heretofore constructed in whole or in part by the army engineers, which provides conservation storage of water for irrigation purposes.

SEC. 9. (a) The general comprehensive plans set forth in House Document 475 and Senate Document 191, Seventy-eighth Congress, second session, as revised and coordinated by Senate Document 247, Seventy-eighth Congress, second session, are hereby approved and the initial stages recommended are hereby authorized and shall be prosecuted by the War Department and the Department of the Interior as speedily as may be consistent with budgetary requirements.

(b) The general comprehensive plan for flood control and other purposes in the Missouri River Basin approved by the Act of June 28, 1938, as modified by subsequent

Acts, is hereby expanded to include the works referred to in paragraph (a) to be undertaken by the War Department; and said expanded plan shall be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers.

(c) Subject to the basin-wide findings and recommendations regarding the benefits, the allocations of costs and the repayments by water users, made in said House and Senate documents, the reclamation and power developments to be undertaken by the Secretary of Interior under said plans shall be governed by the Federal Reclamation Laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto), except that irrigation of Indian trust and tribal lands, and repayment therefor, shall be in accordance with the laws relating to Indian lands.

(d) In addition to previous authorizations there is hereby authorized to be appropriated the sum of $200,000,000 for the partial accomplishment of the works to be undertaken under said expanded plans by the Corps of Engineers.

(e) The sum of $200,000,000 is hereby authorized to be appropriated for the partial accomplishment of the works to be undertaken under said plans by the Secretary of the Interior.

SEC. 10. That the following works of improvement for the benefit of navigation and the control of destructive flood waters and other purposes are hereby adopted and authorized in the interest of the national security and with a view toward providing an adequate reservoir of useful and worthy public works for the post-war construction program, to be prosecuted under the direction of the

Secretary of War and supervision of the Chief of Engineers in accordance with the plans in the respective reports hereinafter designated and subject to the conditions set forth therein: *Provided*, That the necessary plans, specifications, and preliminary work may be prosecuted on any project authorized in this Act to be constructed by the War Department during the war, with funds from appropriations heretofore or hereafter made for flood control, so as to be ready for rapid inauguration of a post-war program of construction: *Provided further*, That when the existing critical situation with respect to materials, equipment, and manpower no longer exists, and in any event not later than immediately following the cessation of hostilities in the present war, the projects herein shall be initiated as expeditiously and prosecuted as vigorously as may be consistent with budgetary requirements: *And provided further*, That penstocks and other similar facilities adapted to possible future use in the development of hydroelectric power shall be installed in any dam authorized in this Act for construction by the War Department when approved by the Secretary of War on the recommendation of the Chief of Engineers and the Federal Power Commission.

* * *

Exhibit No. 6

78TH CONGRESS, *2d Session* } SENATE { DOCUMENT No. 247

MISSOURI RIVER BASIN

REPORT

OF A

COMMITTEE OF TWO REPRESENTATIVES EACH FROM THE CORPS OF ENGINEERS, U. S. ARMY, AND BUREAU OF RECLAMATION, APPOINTED TO REVIEW THE FEATURES OF THE PLANS PRESENTED BY THE CORPS OF ENGINEERS (HOUSE DOCUMENT NO. 475) AND THE BUREAU OF RECLAMATION (SENATE DOCUMENT NO. 191) FOR THE COMPREHENSIVE DEVELOPMENT OF THE MISSOURI RIVER BASIN

Supplemental to Senate Document No. 191 and House Document No. 475, 78th Congress

(**LOGO**)

PRESENTED BY MR. O'MAHONEY

NOVEMBER 21, 1944. – Ordered to be printed

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1944

MISSOURI RIVER BASIN

OCTOBER 25, 1944.

To the SECRETARY OF WAR and the SECRETARY OF THE INTERIOR:

1. In view of the questions raised regarding the differences between the separate plans presented by the Corps of Engineers (H. Doc. 475, 78th Cong., 2d sess.) and the Bureau of Reclamation (S. Doc. 191, 78th Cong., 2d sess.) for the comprehensive development of the Missouri River Basin, a committee, composed of two representatives each from the Corps of Engineers and the Bureau of Reclamation, was appointed to review the engineering features of the two plans with a view of reconciliation between them.

2. The committee met at Omaha, Nebr., on October 16 and 17, 1944, discussed the various features of both plans, examined the supporting data for each plan, and prepared the enclosed joint engineering report. The joint engineering report points out that by making appropriate modifications it is possible to eliminate existing differences between the two plans.

3. It was possible to bring into agreement the plans of the Corps of Engineers and the Bureau of Reclamation by recognizing the following basic principles:

(*a*) The Corps of Engineers should have the responsibility for determining main stem reservoir capacities and capacities of tributary reservoirs for flood control and navigation.

(*b*) The Bureau of Reclamation should have the responsibility for determining the reservoir capacities on the main stem and tributaries of the Missouri River for irrigation, the probable extent of future irrigation, and the amount of stream depletion due to irrigation development.

(*c*) Both agencies recognize the importance of the fullest development of the potential hydroelectric power in the basin consistent with the other beneficial uses of water.

4. For convenience in referring to the joint engineering report the following comparable six subdivisions contained in the report of the Bureau of Reclamation, Senate Document 191, Seventy-eighth Congress, second session, have been used:

(*a*) Upper Missouri River Basin.

(*b*) Yellowstone River Basin.

(*c*) Missouri River – Fort Peck to Sioux City.

(*d*) Minor western tributaries.

(*e*) Niobrara, Platte, and Kansas Rivers.

(*f*) Lower Missouri Basin.

UPPER MISSOURI RIVER BASIN

5. The plan presented in House Document 475, Seventy-eighth Congress, second session, does not specifically designate any units in the upper Missouri River Basin subdivision, although provisions are made for desirable and necessary projects in this area. The plan presented in Senate Document 191, Seventy-eighth Congress, second session, contemplates the construction of

19 reservoirs with a total storage capacity of 3,359,950 acre-feet for flood control, silt control, the development of hydroelectric power, the irrigation of 460,900 acres of new lands, and the provision of a supplemental water supply for 208,700 acres of land now being served with an inadequate water supply. There is no conflict in the proposed plans of the two agencies for the upper Missouri River Basin subdivision.

YELLOWSTONE RIVER BASIN

6. The plan presented in House Document 475, Seventy-eighth Congress, second session, provides for the construction of Boysen Reservoir with a storage capacity of 3,500,000 acre-feet and the Lower Canyon Reservoir with a capacity of 2,250,000 acre-feet to be operated for flood control, irrigation, navigation, power, and other purposes. The plan presented in Senate Document 191, Seventy-eighth Congress, second session, provides for the construction of 27 reservoirs located on various streams in the Yellowstone River subdivision with a total storage capacity of 4,285,200 acre-feet; the reservoirs to be operated for flood control, silt control, the development of hydroelectric power, the irrigation of 509,560 acres of new lands, and the provision of a supplemental water supply for 204,500 acres of land now being served with an inadequate water supply. It was concluded that the plan described in Senate Document 191, Seventy-eighth Congress, second session, would be adequate to accomplish the objectives of the plan described in House Document 475, Seventy-eighth Congress, second session.

MISSOURI RIVER – FORT PECK TO SIOUX CITY

7. The plan presented in House Document 475, Seventy-eighth Congress, second session, contemplates the construction of five additional multiple-purpose reservoirs on the main stem of the Missouri River for flood control, navigation, irrigation, power, domestic and sanitary purposes, wildlife, and recreation, as shown in the following table:

Project	Location	Approximate gross storage capacity (acre-feet)
Garrison	Near Garrison, N. Dak.	17,000,000
Oak Creek	Near Mobridge, S. Dak.	6,000,000
Oahe	Near Pierre, S. Dak.	6,000,000
Fort Randall	Near Wheeler, S. Dak.	6,000,000
Gavins Point	Near Yankton, S. Dak.	200,000

The plan also provides that as soon as substitute storage is built on the main stem of the river, the Fort Peck Reservoir will be operated as a multiple-purpose reservoir primarily in the interest of irrigation.

8. The plan presented in Senate Document 191, Seventy-eighth Congress, second session, contemplates the use of Fort Peck Reservoir primarily for irrigation purposes, also for navigation, flood control, silt control, and power, and the construction of main stem reservoirs to be operated for flood control, irrigation, navigation, power, silt control, and other purposes, as follows:

Project	Location	Approximate gross storage capacity (acre-feet)
Oahe	Near Pierre, S. Dak.	19,600,000
Fort Randall	Near Wheeler, S. Dak	5,100,000
Big Bend	Near Joe Creek, S. Dak	250,000

Senate Document 191, Seventy-eighth Congress, second session, also includes four inland reservoirs to assist in regulating the water diverted from the main stem and the irrigation of 2,292,900 acres of new lands in the Missouri River – Fort Peck to Sioux City subdivision.

9. After full discussion of the various features of the two plans in this subdivision the following main-stem reservoirs were recommended in the joint engineering report in order to more fully utilize the water resources of the basin and to most effectively serve the present and ultimate requirements of flood control, irrigation, navigation, hydroelectric power, and other uses.

Project	Location	Approximate gross storage capacity (acre-feet)
Garrison	Near Garrison, N. Dak	17,000,000
Oahe	Near Pierre, S. Dak	19,600,000
Fort Randall	Near Wheeler, S. Dak.	5,100,000
Big Bend	Near Joe Creek, S. Dak.	250,000
Gavins Point	Near Yankton, S. Dak.	200,000

The final storage capacities to be selected for the above reservoirs will be jointly agreed upon after more detailed plans and cost estimates have been made.

10. The Garrison Dam, Reservoir, and power plant was included in the coordinated plan as it provides a large volume of useful storage capacity for flood control, navigation, and irrigation, and permits the utilization of approximately 160 feet of head for the development of hydroelectric power in an area capable of absorbing the potential output and which, otherwise, has no prospective source of abundant low-cost power. A large reservoir at the Garrison site, situated immediately below the Yellowstone River with its large silt contribution, will prolong materially the life of downstream reservoirs.

11. The selection of the high Oahe Dam, Reservoir, and power plant as proposed in Senate Document 191, Seventy-eighth Congress, second session, floods out the Oak Creek Dam, Reservoir, and power plant as proposed in House Document 475, Seventy-eighth Congress, second session. The high Oahe Dam is required in connection with the irrigation of 750,000 acres of land in the James River Basin as well as to provide useful storage for flood control, navigation, the development of hydroelectric power, and other purposes. If the Oahe Reservoir is constructed to the elevation proposed in Senate Document 191, Seventy-eighth Congress, second session, a greater storage capacity will be provided than contemplated in the low Oahe and Oak Creek Reservoirs at considerably less cost.

12. The Fort Randall Dam in House Document 475, Seventy-eighth Congress, second session, and Senate Document 191, Seventy-eighth Congress, second session, utilizes the same site. However, House Document 475 contemplates a normal pool level at 1,375 mean sea level whereas Senate Document 191 contemplates a pool level at 1,365 mean sea level, in order to not interfere with the

Big Bend power plant located near the upper limits of the reservoir. The Big Bend project is considered highly desirable in the ultimate development inasmuch as approximately 60 feet of head is thereby made available for the development of hydroelectric power. The use of the Garrison, high Oahe, Big Bend, Fort Randall, and Gavins Point Dams and Reservoirs as outlined above and agreed upon in the joint engineering report will provide the desired degree of flood control, supply the needs of irrigation as well as furnish cyclic storage for navigation during prolonged drought periods. The plan also utilizes practically all of the available power head in the Missouri River between the mouth of the Yellowstone River and the Gavins Point Dam.

MINOR WESTERN TRIBUTARIES

13. The plan of development presented in House Document 475, Seventy-eighth Congress, second session, does not specifically designate any units in the minor western tributaries subdivision, although provisions are made for desirable and necessary projects in this area. The plan presented in Senate Document 191, Seventy-eighth Congress, second session, provides for the construction of 15 reservoirs with a total storage capacity of 1,237,000 acre-feet, the reservoirs to be operated for flood control, silt control, the development of hydroelectric power, the irrigation of 212,980 acres of new lands, and the provision of a supplemental water supply for 11,300 acres of land now being served with an inadequate water supply. There is no conflict in the proposed plans of the two agencies for the minor western tributaries subdivision.

NIOBRARA, PLATTE, AND KANSAS RIVERS

14. The plan of development presented in House Document 475, Seventy-eighth Congress, second session, contemplates the construction of 9 reservoirs (of which 4 have been previously authorized) for flood control, irrigation, and other purposes. The lands to be irrigated were not specified in the report and were to be determined by later detailed investigation. The plan presented in Senate Document 191, Seventy-eighth Congress, second session, contemplates the construction of 22 reservoirs on various streams in the Niobrara, Platte, and Kansas Rivers subdivision with a total storage capacity of 5,650,400 acre-feet; the reservoirs to be operated for flood control, silt control, the irrigation of 1,284,060 acres of new land, and the provision of a supplemental water supply to 21,804 acres of land now being served with an inadequate water supply. The following substitutions were found to be desirable in the Kansas River Basin:

(*a*) On the south fork of the Republican River, the Bonny Reservoir, in Senate Document 191, was substituted for the Hale Reservoir in House Document 475 to permit the irrigation of approximately 6,500 acres of additional lands. The two reservoir sites are located within 4 miles of each other and for all practicable purposes would provide a comparable degree of flood control.

(*b*) On the Arikeree River the Pioneer Reservoir, in Senate Document 191, was substituted for the Beecher Island Reservoir in House Document 475 inasmuch as the Pioneer Reservoir controlled a larger drainage area, therefore was more advantageous for flood control, and reconnaissance studies by the Bureau of Reclamation

indicated that there were no lands suitable for irrigation between the two sites.

(*c*) On Frenchman Creek the Enders Reservoir in House Document 475, was substituted for the Harvey Reservoir in Senate Document 191, because the Enders Reservoir could be built to a greater capacity than the Harvey Reservoir, and would furnish additional flood protection for the Frenchman Creek Valley in Nebraska. Both sites are suitably located to serve all potential irrigation developments.

LOWER MISSOURI BASIN

15. The plan of development as presented in House Document 475 and Senate Document 191 for this subdivision are identical, therefore no conflict in the engineering features of the two plans exist. The plans include seven reservoirs and a series of levees and appurtenant works along both sides of the Missouri River from the vicinity of Sioux City, Iowa, to the vicinity of the mouth of the Missouri River.

16. Development of the Missouri River Basin in accordance with House Document 475, Seventy-eighth Congress, second session, and Senate Document 191, Seventy-eighth Congress, second session, as coordinated in the enclosed joint engineering report, if authorized as a unified plan, will secure the maximum benefits for flood control, irrigation, navigation, power, domestic and sanitary purposes, wildlife, and recreation. Precise elevations and heights of reservoirs and dams, and final determinations of the power installations required, can be agreed upon after more detailed plans and cost estimates have been obtained and compared with benefits, and after

consideration has been given to the desires and objections of persons affected by the proposed developments.

HARRY W. BASHORE,
Commissioner,
Bureau of Reclamation,
Department of the Interior.

E. REYBOLD,
Major General,
Chief of Engineers, United States Army,
War Department.

WAR DEPARTMENT,
OFFICE OF THE DIVISION ENGINEER,
MISSOURI RIVER DIVISION,
Omaha, Nebr., October 17, 1944.

Subject: Joint report of representatives of Bureau of Reclamation and Corps of Engineers on plans for development of the Missouri River Basin.

To: The Chief of Engineers, United States Army, Washington, D. C., and the Commissioner, Bureau of Reclamation, Department of the Interior, Washington, D. C.

1. In accordance with instructions contained in letter of October 10, 1944, from the Commissioner of Reclamation to Mr. W. G. Sloan, assistant regional director, Bureau of Reclamation, Billings, Mont., and Mr. John Riter, acting director, Branch of Project Planning, Bureau of Reclamation, Denver, Colo., and letter of same date from the Chief of Engineers to the division engineer, Missouri River division, a conference was held in Omaha, Nebr., on October 16-17, 1944, as a result of which the following joint report is submitted.

2. For purposes of discussion, the basin was divided into the following six subdivisions contained in the report of the Bureau of Reclamation, Senate Document No. 191, Seventy-eighth Congress, second session:

(*a*) Upper Missouri River Basin.

(*b*) Yellowstone River Basin.

(*c*) Missouri River – Fort Peck to Sioux City.

(*d*) Minor western tributaries.

(*e*) Niobrara, Platte, and Kansas Rivers.

(*f*) Lower Missouri Basin.

3. It was agreed that there were no points of conflict in the engineering features of the two plans in the following subdivisions:

(*a*) Upper Missouri River Basin.

(*b*) Minor western tributaries.

(*c*) Lower Missouri Basin.

4. It was agreed that the Yellowstone River Basin be developed in accordance with the plans set forth in Senate Document No. 191, Seventh-eighth Congress, second session. With regard to the other two subdivisions all of the engineering features of both plans were agreed upon with the following modifications:

(*a*) Missouri River: Fort Peck to Sioux City.

(1) The Gavins Point Reservoir and the Garrison Reservoir to be developed in accordance with House Document No. 475 Seventy-eighth Congress, second session.

(2) The Fort Randall Reservoir, the Big Bend Reservoir, and the Oahe Reservoir to be developed in accordance with Senate Document No. 191, Seventy-eighth Congress, second session.

(3) The Oak Creek Reservoir, as proposed in House Document No. 475, Seventy-eighth Congress, second session, to be eliminated.

(*b*) Niobrara, Platte, and Kansas Rivers: It was agreed to substitute the Bonny and Pioneer Reservoirs, as proposed in Senate Document No. 191, Seventy-eighth Congress, second session, for the Hale and Beecher Island Reservoirs as proposed in House Document No. 475, Seventy-eighth Congress, second session, and to substitute the Enders Reservoir as proposed in House Document No. 475, Seventy-eighth Congress, second session, for the Harvey Reservoir as proposed in Senate Document No. 191, Seventy-eighth Congress, second session.

R. C. CRAWFORD,
Brigadier General, United States Army,
Division Engineer,

GAIL A. HATHAWAY,
Head Engineer,
Representing Office of the
Chief of Engineers.

W. G. SLOAN,
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Billings, Mont.

JOHN R. RITER,
Acting Director, Branch of Project Planning,
Bureau of Reclamation,
Denver, Colo.

No. 03-935

Supreme Court, U.S.
FILED
FEB 27 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

STATE OF NORTH DAKOTA AND
STATE OF SOUTH DAKOTA,

Petitioners,

v.

LT. COLONEL KURT F. UBBELOHDE, DIST. ENGINEER, OMAHA DIST., U.S. ARMY CORPS OF ENGINEERS; BRIG. GEN. W. T. GRISOLI, COMMANDER, NW DIV., PORTLAND, OR., U.S. ARMY CORPS OF ENGINEERS; MO-ARK ASSOCIATION; STATE OF NEBRASKA; AND THE STATE OF MISSOURI; ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the 1944 Flood Control Act allows the Corps of Engineers to consistently allocate the water from the Missouri River's upper basin reservoirs to serve downstream navigation at the expense of upstream fish, wildlife and recreation?

CORPORATE DISCLOSURE

Pursuant to Rule 29(6), Respondent MO-ARK Association makes the following Corporate Disclosure Statement:

A. The MO-ARK Association is a voluntary, non-profit corporation organized and operating under the laws of the State of Kansas which promotes flood control, navigation, irrigation, recreation, fish and wildlife, the environment, conservation and the beneficial use of land and water resources within the Missouri River Basin and the portion of the Arkansas River Basin that runs through Kansas and Missouri.

B. The MO-ARK Association does not have any corporate parents.

C. As a non-profit corporation, the MO-ARK Association does not issue stock, and, therefore, no publicly-held company owns any stock in the MO-ARK Association.

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South Dakota v. Ubbelohde, 330 F.3d 1014 (8th Cir. 2003) 4, 13

FEDERAL STATUTES AND RULES

Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887 (1944) 7, 12, 13, 17

Missouri River Main Stem Reservoir System Reservoir Regulation Manual, U.S. Army Engineer Division, Missouri River, Corps of Engineers, Omaha, Nebraska, 1979 ("1979 Master Manual") 2, 3, 11, 14

Missouri River Main Stem Reservoir System Reservoir Regulation Manual, Master Manual, U.S. Army Engineer Division, Missouri River, Corps of Engineers, Omaha, Nebraska, December 1960 ..... 14, 17

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Congressional Record, 78th Cong., 2d Sess., January 13, 1944, p. 151 17

Flood Control Act of 1944, H.R. 4485, 78th Cong., 2d Sess. (1944) 15

Interior on the Bureau of Reclamation's Plan for Basin Development. Joint Report – S. Doc. 247, 78th Cong., 2d Sess. 3 (1944) 14

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Missouri River Revised Draft Environmental Impact Statement, Master Water Control Manual Review and Update, U.S. Army Corps of Engineers, Northwest Division, August 2001 2

Office of Counsel, Department of the Army, "The Role of Recreation in the Regulation of the Corps of Engineers Constructed and Operated Main Stem Reservoirs of the Missouri River" 25 (August 6, 1990) 15

Pick Plan – H. Doc. 475, "Missouri River Basin," Letter from the U.S. Army Chief of Engineers, with Report on a Review of Reports on the Missouri River for Flood Control from Sioux City, Iowa to the Mouth; 78th Cong., 2d Sess., March 2, 1944 14

Sloan Plan – S. Doc. 191, "The Missouri River Conservation, Control, and Use of Water Resources of the Missouri River Basin in Montana, Wyoming, Colorado, North Dakota, South Dakota, Nebraska, Kansas, Iowa, and Missouri." Report of the Secretary of the Interior on the Bureau of Reclamation's Plan for Basin Development. Joint Report – S. Doc. 247, 78th Cong., 2d Sess. 3 (1944) 14

Sax, Joseph L., et al., Legal Control of Water Resources 644 (2d ed. 1991) at 165, 971 16

STATEMENT OF THE CASE

The provincial picture painted by the Dakotas is in need of correction. Pet. 8, 9. Please note the following facts.

The subject case arises out of administrative decisions regarding the management of the Missouri River, which runs through seven states from Montana to Missouri. In 2002, the U.S. Army Corps of Engineers ("Corps") chose to lower a single reservoir, Lake Oahe, and to hold water levels in the other five reservoirs constant to maintain downstream river flow. Pet App. 3, 4, 7. The year 2002 was one of regional drought. *Id.*

To frame the decisions, the Corps operates six dams and reservoirs on the main stem of the Missouri River. They are Fort Peck Dam and Lake in Montana, Garrison Dam and Lake Sakakawea in North Dakota, Lake Oahe in North Dakota and South Dakota, Big Bend Dam and Lake Sharpe in South Dakota, Fort Randall Dam and Lake Francis Case in South Dakota, and Gavins Point Dam and Lewis and Clark Lake in Nebraska and South Dakota. Pet. App. 4. The navigation channel runs from Sioux City, Iowa to the confluence of the Missouri and Mississippi Rivers at St. Louis, Missouri. Municipalities, power plants, industry, terminals and farms are located along the Missouri River.[1]

Pursuant to the authorities arising under the Flood Control Act of 1944, the Corps adopted and published a revised Master Manual in 1979 for the purpose of operating the main stem Missouri River reservoirs. Each year the Corps adopts a Missouri River Main Stem System

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[1] *See* references to Appendix *infra*.

Annual Operating Plan ("AOP") pursuant to the Master Manual for the purpose of providing more precise reservoir operating instructions. The Corps's decision to lower Lake Oahe was made in accordance with its 2002 AOP. Pet. App. 7. Legal action followed.

In late April of 2002, the State of South Dakota filed a complaint in the United States District Court of South Dakota, Central Division, seeking an order restraining the Corps from altering the level of Lake Oahe in North and South Dakota to protect South Dakota's interest in recreational fishing. Shortly thereafter, South Dakota amended its Complaint to prevent the Defendants from altering the levels of any of the main stem reservoirs lying upstream of Nebraska. A temporary restraining order was followed by a preliminary injunction. Pet. App. 35, 49. Other parties sought and obtained injunctive relief in other District Courts. Pet. App. 9.

With respect to economic facts, a national perspective is in order. One way to value uses of the system is to determine their National Economic Development ("NED") benefits.[2] The Corps's stated NED benefits in the Revised Draft Environmental Impact Statement ("RDEIS")[3] for

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[2] A few words of caution. The methods to determine NED benefits vary among uses, and NED benefits for different uses are not properly additive. NED benefits also do not reflect impacts on regional economies. Further, various parties including the Respondent, MO-ARK Association, have questioned the following numbers on the administrative record for the Review and Update of the Missouri River Main Stem Reservoir System Reservoir Regulation Manual, U.S. Army Engineer Division, Missouri River, Corps of Engineers, Omaha, Nebraska, 1979 ("1979 Master Manual").

[3] Missouri River Revised Draft Environmental Impact Statement, Master Water Control Manual Review and Update, U.S. Army Corps of Engineers, Northwest Division, August 2001, Table 5.13-1.

recreation are $84.7 million per year under the 1979 Master Manual. In contrast, the stated annual average benefits under the 1979 Master Manual for other major uses are as follows: for flood control, $410.3 million; for water supply, which includes municipal water supply, irrigation, cooling water, and commercial, industrial and domestic uses, $611.06 million; for navigation, $7 million; and hydropower, $741.52 million.

What is more, approximately $20 million of the NED benefits for recreation are attributed to recreation below the Gavins Point Dam, the last dam in the system. One must further reduce the number for recreation benefits to account for recreation on the upper river. This leaves the stated NED benefits for recreation on the Oahe, Garrison and Ft. Peck reservoirs under the 1979 Master Manual at only $31.4 million per year.[4]

The MO-ARK Association, Ergon Asphalt and Emulsions, Inc., and other corporate entities submitted evidence to the South Dakota District Court with their motions to intervene.[5] This evidence substantiated the following injuries from the reduction in flows sought by South Dakota:

1. Decreases in water quality and increases in treatment costs at water treatment facilities (Schrempp Aff. ¶¶ 3, 4,

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[4] *Id.* at Table 5.11-1.

[5] Please note that the MO-ARK Association also intervened in the District of Nebraska suit brought by the State of Nebraska (02-2191NE). Pet. 10. The MO-ARK Association filed similar evidence in support of both motions to intervene.

Appendix[6] Ex. No. 17; Pogge Aff. ¶¶ 3, 4, Appendix Ex. No. 17; Cieslik Aff. ¶ 29, Appendix Ex. No. 21).

2. Restricted ability of St. Louis, Kansas City and Jefferson City, Missouri to draw drinking water from the Missouri River and harm to endangered and threatened species (Mahfood Aff., Appendix Ex. No. 17).

3. Shipping delays that would severely damage river terminal operations, causing the loss of jobs and income, and reducing the supply of fertilizer available to farmers (LaMothe Aff. ¶¶ 5-9, Appendix Ex. No. 17).

4. Damage to barges and tow boats that will settle on the bottom of the Missouri River, possibly leaking hazardous cargo (Blaske Aff. ¶¶ 5, 10, Appendix Ex. No. 17; Cieslik Aff. ¶ 21, Appendix Ex. No. 21).

5. Loss of revenue of over $800,000 for one tow barge operation, leading to the loss of jobs and the potential failure of the business (Blaske Aff. ¶¶ 7, 11, Appendix Ex. No. 17).

6. Higher fertilizer costs, lower grain prices and lower farm income (Jackson Aff. ¶¶ 2-4; Waters Aff. ¶¶ 2-4; Johnson Aff. ¶¶ 2-4; *The Impact to Missouri Agriculture of Reduced Waterflow on the Missouri River,* prepared by the Missouri Department of Agriculture, June 1991; all at Appendix Ex. No. 17).

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[6] "Appendix" in this statement of facts refers to the Joint Appendix in the record before the Eighth Circuit Court of Appeals, *South Dakota v. Ubbelohde.*

7. Negative impacts on the storage and distribution of liquid asphalt products from Exxon-Mobil and others to highway contractors in a several state area, including the states of South Dakota, Iowa, Minnesota and Nebraska, which product is shipped by barge. In addition, highway contractors, State Departments of Transportation and city and county governments may likely experience delays in their construction projects and suffer increased costs (Cheever Aff., Appendix 170).

8. The interstate shipment of goods would be interrupted (Butterfield Aff., Appendix at 174).

9. A shut down of commercial navigation on the Missouri River until the second week of June would cause a loss of revenue of approximately $1,280,000 to the Magnolia Marine Transport Company (Humphreys Aff., Appendix at 176).

10. Koch Materials Company will be required to use trucking or rail as an alternate means of supplying asphalt at an increased cost of approximately $150,000 through May 31, 2002 and at an increased cost of approximately one million dollars annually if the Corps is enjoined for an extended period (Hamman Aff., Appendix at 178).

11. Phillips 66 Company sells asphalt products to the highway construction industry through a terminal at Kansas City which relies on over 95% of its supply moving by barge on the Missouri River from its refinery at Wood River, Illinois. The direct financial impact of using more expensive rail car and truck transportation is calculated to exceed $350,000. Shipping by rail is approximately double the cost, and shipping by truck is approximately three times the cost as shipping by water. Should the closure of

the navigation channel extend longer, there would be a high probability that Phillips 66 Company could not keep up with demand to re-supply the terminal (Haverland Aff., Appendix at 183).

Based on the above-referenced affidavits and report, navigation on the Missouri River has not peaked as stated by South Dakota and North Dakota. In addition, goods and commodities other than grain are shipped on the Missouri River, e.g. asphalt, steel, equipment, road salt, cement, fertilizer, sand and gravel.

Moreover, the statement by North and South Dakota regarding the ruling by the Eighth Circuit is incomplete. Pet. 13, 14. Importantly, the ruling was based on more than adverse impacts to navigation. "Ultimately, downstream flows were reduced, and navigation and other downstream interests suffered." Pet. App. 10.

The Eighth Circuit reversed the South Dakota District Court's denials of the motions to intervene. Pet. App. 18. In doing so, the Eighth Circuit based its finding that the proposed intervenors had standing on "evidence that a reduction in the flow of the River would cause a great deal of harm to downstream interests." Pet. App. 14.

> They [the proposed intervenors] offered to present significant evidence that a reduction in the flow of the River would cause a great deal of harm to downstream interests. Among the threats were an interruption in their ability to navigate the River, problems for power plants that relied upon the River water for cooling, and decreases in water quality for community water supplies. Moreover, the parties presented

> evidence that decreasing the flow for even a short period of time could be troublesome because of the effects that such a short-term reduction could have on wildlife. Specifically, the parties presented evidence that if the water levels were decreased, two endangered species of birds would nest on the newly exposed river bed. Once the birds nested, the proposed intervenors feared, the water flow could not be increased until after the fledgling birds could leave the nest. Thus, according to this argument, flow reduction could not be limited to a short term.

Id.

REASONS FOR DENYING THE PETITION

1. The primary issues in the decision below do not raise the Question Presented.

The sole Question Presented in the Petition (p. i) is whether the 1944 Flood Control Act allows the Corps of Engineers to consistently allocate the water from the Missouri River's upper basin reservoirs to serve downstream navigation at the expense of upstream fish, wildlife and recreation?

(1) To the contrary, the primary question addressed by the Eighth Circuit was whether there is law to apply to subject the Corps's actions to judicial review. Pet. App. 20, 21. Finding that the "Flood Control Act clearly provides some law to apply," and that the Master Manual is binding on the Corps, the Eighth Circuit proceeded to address the standards "that courts regularly employ in reviewing agency action." Pet. App. 21, 27. The opinion on the standards for judicial review of agency action is not novel and does not raise the Question Presented.

(2) Next, the Eighth Circuit disposed of South Dakota's judicial estoppel theory, a theory based upon an alleged agreement reached in previous litigation in Montana. Pet. App. 28. "South Dakota maintains, the Corps agreed to give all interests, including recreation, equal consideration in the management of the River – as opposed to giving flood control, navigation, or other interests priority over recreation – until the revision of the Master Manual was complete." Pet. App. 28. North Dakota made a similar argument in favor of affirming the injunction entered in North Dakota. Pet. App. 31. This issue was decided on the facts and the nature of the Corps's agreement. The Eighth Circuit found that "[e]qual consideration does not mean equal results." Pet. App. 29. Since the Eighth Circuit ruled that there is no evidence that the Corps did not give equal consideration to recreation, it did not reach the question of whether the elements of judicial estoppel were met. *Id.* Clearly, a fact-bound determination of the import of an agreement does not raise the Question Presented.

(3) The third primary issue the Eighth Circuit considered was "whether the Corps's decision to lower Lake Oahe in the Spring of 2002 to maintain downstream navigation was arbitrary and capricious." Pet. App. 30. North Dakota raised a similar argument. The court found that the policy choice was not arbitrary and capricious in that the Corps provided a rational basis for its decision to lower one reservoir per year during drought conditions. *Id.* Whether there was a rational basis for a distinct policy decision does not raise the Question Presented.

2. The Question Presented requires fact-bound judgments.

The terms "consistent allocation" and "at the expense of" in the Question Presented are fact-bound determinations that are not appropriate for review by this Court. The answer to such a question only could involve judicial review of every decision by the Corps, a standard which the Eighth Circuit rejected.

> South Dakota maintains that the sum total of this legislative history compels the Corps to balance the interests each year so as to maximize each category of benefits, and that the courts can review the annual operating plans to ensure that they do indeed maximize the benefits. . . . We reject this argument. South Dakota's proffered standard – whether the Corps's management of the River maximizes the benefits to all interests – is not the kind of standard that courts regularly employ in reviewing agency action. . . . Under South Dakota's proffered standard the Corps's actions would receive no deference and the courts could be called upon to review every decision that the Corps makes, no matter how minute.

Pet. App. 27, 28. That the Dakotas' goal in seeking *certiorari* is judicial review of every decision that the Corps makes is evidenced by the last sentence in their Petition: a call for "judicial supervision of military officers." *Id.*

3. The record does not raise the Question Presented.

It is erroneous to portray the conflict in this matter as upstream recreation in the reservoirs versus navigation. Flows necessary to support navigation also foster flood control and benefit power supply, downstream municipal and industrial water supply (including electric power generation) and water quality, downstream recreation, agriculture and interior drainage. As set forth in the Statement of the Case above, the benefits attributed to these interests dwarf the economic benefit from reservoir recreation to the fine States of Montana, North Dakota and South Dakota. What is more, the Eighth Circuit found that more than navigation suffered as a result of the injunctive relief granted to the upstream states: "navigation and other downstream interests suffered." Pet. App. 10.

In the preamble of its opinion (Pet. App. 4), the Eighth Circuit states that the action arose out of a decision by the Corps "to release water from a single reservoir, Lake Oahe, to maintain downstream river flow."

> The policy choice that South Dakota is challenging is not arbitrary and capricious. The Corps provided a rational basis for its decision to lower one reservoir per year during drought conditions. The Corps had evidence that every reservoir did not need to have a good spawn each year to maintain fish stocks. . . . The Corps decided to alternate the harm among the reservoirs, maintaining the water level at all but one reservoir each year. This plan would presumably allow each reservoir to have a fruitful spawn five out of every six years even in the worst drought conditions. This plan was eminently rational. South Dakota's efforts to increase the rainbow smelt stock during the Spring of 2002 do not make the

> plan irrational. . . . Moreover, if Lake Oahe had been lowered as planned in 2002, it presumably would not be lowered in 2003, which would allow for a fruitful spawn this year.

Pet. App. 30, 31. As the Eighth Circuit found, the Corps's plan would allow for fish spawns at Lake Oahe in five out of every six years even in the worst drought conditions. Quite clearly, the facts before the Eighth Circuit did not raise the question of the Corps's *consistent* allocation of water from the reservoirs to serve downstream navigation at the expense of upstream fish, wildlife and recreation.

4. An administrative process is ongoing.

While the upstream states seek to benefit from stable or rising pool levels in the spring and summer to serve recreation, such a policy has great impacts on other uses, especially in times of drought. Here, there are debatable policy considerations at issue. The Corps is currently wrestling with these policy issues in the midst of the review and update of the 1979 Master Manual.[7] Subject to judicial review, such decisions involving agency expertise are not within the province of this Court.

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[7] Missouri River Master Water Control Manual Review and Update.

5. The Eighth Circuit's decision does not conflict with a decision of the Supreme Court.

North and South Dakota do not assert that the Eighth Circuit's decision conflicts with any other court of appeals, and their assertion that the Eighth Circuit misread *ETSI Pipeline Project v. Missouri*, is misplaced. Pet. 26, 27. In addressing the question of whether there is law to apply for the purpose of judicial review, the Eighth Circuit states that the Flood Control Act:

> lays out purposes that the Corps is to consider in managing the River. The Act recognizes what the Supreme Court has called the dominant functions of the River's reservoir system – flood control and navigation. *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 512, 108 S.Ct. 805, 98 L.Ed.2d 898 (1988). While flood control and navigation are dominant functions, the Act also recognizes recreation and other interests and secondary uses that should be provided for. Flood Control Act Section 4, 58 Stat. at 889-90. The text of the Flood Control Act thus sets up a balance between flood control, navigation, recreation, and other interests.

Pet. App. 21.

Earlier in the opinion, the Eighth Circuit considers the language in the Flood Control Act relating to project purposes and congressional intent:

> The Act also laid out certain substantive interests that it was to serve. The dominant functions of the Flood Control Act were to avoid flooding and to maintain downstream navigation. *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 512, 108 S.Ct. 805, 98 L.Ed.2d 898 (1988). The Act's dominant functions were expressed repeatedly in

> three Congressional Documents: Senate Documents 191 and 247 and House Document 475. See Flood Control Act Section 9, 58 Stat. at 891.

Pet. App. 5.

The Eighth Circuit's statements regarding *ETSI Pipeline Project v. Missouri* are accurate and do not conflict with the holding in such case. 484 U.S. 495, 512, 108 S. Ct. 805, 98 L.Ed.2d 898 (1988). The Supreme Court states that "[t]he Sloan Plan recognized that the 'dominant function' of Lake Oahe would be flood control and navigation, and therefore these projects would come under the jurisdiction of the Army and its Corps of Engineers." *Id.* at 512. The Eighth Circuit's reference to this passage is entirely appropriate since the issue before the Eighth Circuit related to the Corps's discretion for actions within its jurisdiction.

Furthermore, the Eighth Circuit's opinion does not conflict with the holding in *ETSI*. Indeed, the Eighth Circuit's decision and this Court's affirmation of the Eighth Circuit's decision in *ETSI* share common ground in that both decisions evince standards to avoid "review [of] every decision" and "endless squabbles." *Ubbelohde,* 330 F.3d at 1031; *ETSI*, 484 U.S. at 515, 108 S.Ct. at 816.

6. The Eighth Circuit's decision was correctly decided.

The Eighth Circuit correctly stated that flood control and navigation are dominant functions under the Flood Control Act of 1944. Pet. App. 5. The Flood Control Act of

1944 adopts the priorities set forth in the Pick-Sloan Plan.[8] The Joint Report or Pick-Sloan Plan lists the purposes of the upstream reservoirs as "flood control, irrigation, navigation, hydroelectric power, and other uses" in that order. These established priorities are properly set forth in the subject 1979 Master Manual, which the Eighth Circuit deemed binding. Pet. App. 26. Furthermore, these priorities are consistent with those in the first manual published in 1960.[9]

The 1979 Master Manual lists the priorities for operation of the main stem system as follows:

> *First*, "flood control will be provided for by observation of the requirement that an upper block of this intermediate storage space in each reservoir will be vacant at the beginning of each year's flood season, with evacuation scheduled in such a manner that flood conditions will not be significantly aggravated if at all possible"; *Second*, "all irrigation, and other upstream water uses for beneficial consumptive purposes";

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[8] Pick Plan – H. Doc. 475, "Missouri River Basin," Letter from the U.S. Army Chief of Engineers, with Report on a Review of Reports on the Missouri River for Flood Control from Sioux City, Iowa to the Mouth; 78th Cong., 2d Sess., March 2, 1944; Sloan Plan – S. Doc. 191, "The Missouri River Conservation, Control, and Use of Water Resources of the Missouri River Basin in Montana, Wyoming, Colorado, North Dakota, South Dakota, Nebraska, Kansas, Iowa, and Missouri." Report of the Secretary of the Interior on the Bureau of Reclamation's Plan for Basin Development. Joint Report – S. Doc. 247, 78th Cong., 2d Sess. 3 (1944).

[9] Missouri River Main Stem Reservoir System Reservoir Regulation Manual, Master Manual, U.S. Army Engineer Division, Missouri River, Corps of Engineers, Omaha, Nebraska, December 1960, at Section IX, 9-3.

> *Third*, "downstream M&I [municipal and industrial] water supply and water quality requirements"; *Fourth*, "the remaining water supply available will be regulated in such a manner that the outflow from the reservoir system at Gavins Point provides for equitable service to navigation and power"; *Fifth*, "efficient generation of power to meet the area's needs consistent with other uses"; and *Sixth*, and last, "insofar as possible without serious interference with the foregoing functions, the reservoirs will be operated for maximum benefit to recreation, fish and wildlife."

Section IX.

That the Corps must continue to abide by the priorities established by Congress is supported by the Corps's past responses to issues about the operation of the system. The Corps's own legal counsel has claimed that "any revision involving a significant determent to one or more of the actual purposes of the currently settled priorities of the system would suggest the need for prior congressional authorization."[10]

Furthermore, the O'Mahoney-Millikin Amendment,[11] codified in the Flood Control Act of 1944 at 33 U.S.C. § 701-1(b), does not support elevating the interest of

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[10] Office of Counsel, Department of the Army, "The Role of Recreation in the Regulation of the Corps of Engineers Constructed and Operated Main Stem Reservoirs of the Missouri River" 25 (August 6, 1990).

[11] Flood Control Act of 1944, H.R. 4485, 78th Cong., 2d Sess. (1944).

recreation above its status as a "lower priority."[12] The amendment reads in relevant part as follows:

> The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in states wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in states lying wholly or partly west of the ninety-eighth meridian of such waters for domestic, municipal, stock water, irrigation, mining or industrial purposes.

Granted, the reservoirs are located in States that lie "wholly or partly west of the ninety-eighth meridian," but recreation is not a "beneficial consumptive use." The term consumptive use is defined as "the amount of water consumed by a particular use and thus unavailable for further use."[13] Since recreation is not a beneficial consumptive use, it is not entitled to priority over navigation.

Furthermore, the Dakotas improperly seek to use the language in the Declaration of Policy in the 1944 Act to support elevating the interest of recreation. The Declaration states that it is the policy of the Congress:

> In connection with the exercise of jurisdiction over the rivers of the Nation through the construction of works of improvement, for navigation or flood control, as herein authorized, . . . to facilitate the

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[12] Joint Hearing on Missouri Basin Water Problems, 85th Cong., 1st Sess., 418-430 (1957) (statement of the Chief of Engineers).

[13] Sax, Joseph L., et al., Legal Control of Water Resources 644 (2d ed. 1991) at 165, 971.

> consideration of projects on a basis of comprehensive and coordinated development; and to limit authorization and construction of navigation works to those in which a substantial benefit to navigation will be realized therefrom and which can be operated consistently with appropriate and economic use of the waters of such rivers by other users.[14]

The navigation works for the main stem system were authorized and in part constructed at the same time or prior to the Flood Control Act of 1944. The construction of the nine-foot navigation channel on the Missouri River from Sioux City to St. Louis was included in the House Rivers and Harbors Committee's omnibus bill for waterways projects in 1944.[15] Therefore, a cost-benefit approach is unavailable to justify additional water for recreation over the needs of Missouri River navigation. Further, as shown above, navigation flows support other uses that are economically more important than reservoir recreation.

Lastly, the fact that irrigation in the upstream states has not developed due to poor soil conditions does not change the priorities set forth in the Flood Control Act of 1944 and the Master Manual. Again, irrigation is a beneficial consumptive use but not recreation.

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[14] 33 U.S.C § 701-1, c. 665 § 1, 58 Stat. 887 (Dec. 22, 1944).

[15] Congressional Record, 78th Cong., 2d Sess., January 13, 1944, p. 151.

CONCLUSION

For all of the foregoing reasons, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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In The Supreme Court of the United States

STATE OF NORTH DAKOTA AND
STATE OF SOUTH DAKOTA,

Petitioners,

v.

LT. COL. K.F. UBBELOHDE, DIST. ENGINEER, OMAHA DIST., U.S. ARMY CORPS OF ENGINEERS; BRIG. GEN. W.T. GRISOLI, COMMANDER, NW DIV., PORTLAND, OR., U.S. ARMY CORPS OF ENGINEERS; STATE OF MISSOURI; AND THE STATE OF NEBRASKA; ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 15, the State of Nebraska ("Nebraska") submits its brief in opposition to the Petition for Writ of Certiorari (the "Petition") filed by the State of North Dakota ("North Dakota") and the State of South Dakota ("South Dakota"), collectively referred to herein as "the Dakotas."

In sum, the Dakotas dramatically misstate the issue presented and ruled on below. The Eighth Circuit Court of Appeals, in *South Dakota v. Ubbelohde*, 330 F.3d 1014 (2003), did not decide the Question Presented as articulated by the Dakotas. The Eighth Circuit ruled on discrete issues arising under the Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887 (1944), and the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* The issues the Court of Appeals addressed were correctly decided. By their Petition, the Dakotas improperly seek judicial review of the wisdom of Congressional choice and a reallocation of the waters of the Missouri River. The Petition should be denied.

OBJECTION TO CONSIDERATION OF THE QUESTION PRESENTED

Supreme Court Rule 15.2 admonishes counsel "that they have an obligation to the Court to point out . . . any perceived misstatement made in the Petition." The rule cautions, "[a]ny objection to consideration of a question presented based on what occurred in the proceedings below . . . may be deemed waived unless called to the

Court's attention on the brief in opposition." In furtherance of this obligation, Nebraska objects to the Question Presented. Nebraska further objects to the Dakotas' distorted portrayal of the interests of the downstream states. The bases of Nebraska's objections are set forth herein.

STATEMENT OF THE CASE

I. MISSOURI RIVER MAIN STEM DAM AND RESERVOIR MANAGEMENT

The Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887 ("FCA"), authorized the construction and operation of dams and reservoirs by the United States Army Corps of Engineers ("Corps") on the main stem of the Missouri River.[1] Congress made flood control and navigation the "dominant function" for which the Secretary of War was to manage the system. *See ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 512, 108 S.Ct. 805, 815 (1988). In addition, the main stem dam and reservoir system provides a wide range of benefits to each of the Missouri River Basin states. Authorized project purposes (other than the primary purposes of navigation and flood control) include water supply, power generation, irrigation, recreation and fish and wildlife. *E.g.*, S. DOC. NO. 247, 78th Cong., 2nd Sess. (Nov. 21, 1944) at 3. In adopting the FCA, Congress recognized that the amount of water in storage

[1] The Dakotas claim all five reservoirs are located within their borders. Petition at 5. One of the dams, Gavins Point, is located in both South Dakota and Nebraska.

behind the dams would fluctuate from year-to-year based on available precipitation and the need to meet authorized downstream uses, for which water from the reservoirs was to be released. *Id.* at 3-4. As a result, the dams are not operated in isolation, but rather as an integrated system functioning in concert.

To implement the provisions of the FCA, the Corps adopted regulations in accordance with Section 7 of that Act, now codified at 33 U.S.C. § 709, requiring the establishment of "water control plans" for all Corps projects, and the preparation of "master manuals" where several projects within a drainage have interrelated purposes. 33 C.F.R. § 222.5(a) & (i)(2). The Corps adopted the Missouri River Main Stem Reservoir System Reservoir Regulation Manual ("Master Manual") in 1960 and made revisions to it in 1975 and 1979. The Master Manual presents the regulatory framework by which the Corps attempts to achieve the multiple purposes for which the dam and reservoir system was created. *E.g.*, Master Manual, § IX, ¶ 9-1 ("Presented in this section of the manual are the operational objectives and requirements, together with descriptions of multi-purpose operation plans for functions other than flood control. These functions include irrigation, navigation, water supply, power, fish and wildlife, water quality, and recreation."). The Dakotas never challenged the validity of the Master Manual or its revisions until now.

In addition to its primary navigation and flood control mandates, the FCA also required the Corps to produce hydropower from the main stem dams to provide affordable electric power over a multi-state region and to offset the enormous cost of dam construction. Section 5 of the FCA states: "Electric power and energy generated at

reservoir projects under the control of the War Department and in the opinion of the Secretary of War not required in the operation of such projects shall be delivered to the Secretary of the Interior, who shall transmit and dispose of such power and energy in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles. . . . " *See also* S. DOC. 247 at 1, 3-4. In view of this obligation, the Corps has placed a high priority on the production of hydropower, which is marketed throughout the Missouri River basin by a separate federal agency, the Western Area Power Administration ("WAPA"). The Master Manual reflects this priority and allows the Corps to release water stored in the main stem reservoirs to achieve "the efficient generation of power to meet the area's needs consistent with other uses and power market conditions." Master Manual, § IX, ¶ 9-3.

Since 1960, significant economic development has occurred along the Missouri River that is dependant upon the water management regime established by the Master Manual and the River flows maintained thereunder. From 1960 to the present, the Corps has operated the main stem dams and reservoirs in accordance with the Master Manual. The existing flow regime supports a wide range of economic activities along the River. Municipalities, private industry and power producers have constructed extensive infrastructure designed to utilize the Missouri River for its authorized purposes in direct reliance on the flow regime created by such operations. Thus, this case does not simply pit the downstream navigation industry against upstream recreation interests as the Dakotas incorrectly assert. *E.g.*, Petition at (i).

The National Academy of Sciences ("NAS") recently highlighted the importance of the Missouri River as a source of supply for municipal and industrial uses. NATIONAL ACADEMY PRESS, THE MISSOURI RIVER ECOSYSTEM: EXPLORING THE PROSPECTS FOR RECOVERY (2002) ("NAS Report").[2] The water supply benefits of the Missouri River "accrue at intakes for thermal power plants and at municipal, irrigation, commercial/industrial, domestic, and public water intakes so long as daily flows exceed minimum elevation requirements for water intakes." *Id.* at 93. Nebraska has the largest share of water supply benefits derived from existing Corps operations. The NAS explains that in 1994, for instance, the Corps found $571.6 million in annual benefits (i.e., cost savings) from the withdrawal of water from the Missouri River. *Id.* It noted that water supply benefits "are concentrated in the thermal generating activities in Nebraska and Iowa." *Id.* Of the total water supply benefits accruing to the Basin, Nebraska receives 44.8%, or approximately $256 million annually in 1994 dollars. *Id.* at 94. Hydropower benefits, measured by the costs of alternative supplies, have an annualized value of $615 million. *Id.* at 97. Of that benefit, Nebraska receives 27.3%, or approximately $168 million. *Id.*

These numbers are staggering, but perhaps most impressive is the $18 billion in total flood damage prevented as of 1998 as a result of the FCA. NAS Report at 99. The principal states benefiting from such flood control operations include Nebraska, which receives 18.7% – or over $77 million – of the annualized $414 million flood

[2] The NAS Report is available, in its entirety, from the National Academy Press at http://books.nap.edu/catalog/10277.html.

control benefits accruing to the Basin. *Id.* at 100. These figures only take into account property damage and cannot quantify the incalculable value of lives saved by the Corps' operations.

In Nebraska alone, four publicly owned thermal power plants have historically relied, and continue to rely, on the flow regime set forth in the Master Manual. The existing flow regime represents the plants' sole source of water for cooling purposes. These plants will be forced to curtail production or shut down entirely if the Corps fails to release water from upstream reservoirs as required under the Master Manual. Retention of water upstream in contravention of the Master Manual will also decrease the amount of hydropower generated at the main stem facilities and available for purchase from WAPA. Because Nebraska utilities purchase more hydropower than the utilities of any other state, Nebraska power consumers will be disproportionately adversely impacted by reduced hydropower supplies. Nevertheless, other Missouri River Basin states are similarly reliant on the River and WAPA hydropower. Thus, the entire region could be impacted adversely by departure from the Master Manual.

Finally, the FCA authorized fishing and other recreational pursuits at the main stem reservoirs on certain conditions. Section 4 of the FCA states: "The water areas of all such reservoirs shall be open to public use generally, without charge, for boating, swimming, bathing, fishing, and other recreational purposes . . . when such use is determined by the Secretary of War not to be contrary to the public interest." *Id.* The Master Manual implements this provision by requiring the operation of the main stem dams to provide for recreation "insofar, as possible without

serious interference" with the other project purposes. Master Manual, § IX, ¶ 9-3.

Although not accorded the highest priority by Congress, recreation does have a role in the Missouri River system. In fact, the "national and world class sport fisheries" and related recreational interests discussed in the Petition were created in the first instance by construction of the main stem dams and reservoirs and the Corps' operations under the Master Manual. As the Dakotas explain, they benefit greatly from "thriving upstream recreation." Petition at (i), 8-9. They, nevertheless, claim that their interests in the Missouri River are somehow "compromised" by operations under the Master Manual and the Eighth Circuit's decision enforcing the same. Petition at 16. The Dakotas now seek to *maximize* their recreational revenues at the expense of the downstream states.

II. HISTORY OF THE PRESENT MISSOURI RIVER LITIGATION.

South Dakota v. Ubbelohde "arose out of the prolonged drought conditions that the Missouri River has been experiencing over the last several years." 330 F.3d at 1020. The Master Manual is designed to provide for the orderly operation of the main stem reservoirs under a range of climatic conditions, including drought. *E.g.*, 33 C.F.R. §§ 222.5(i)(1); 222.5(i)(5). The Master Manual requires the Corps to release water from upstream reservoirs to meet authorized project purposes downstream. In order to minimize any disruption to upstream interests resulting from those releases, the Master Manual employs a rotational scheme, allowing for releases from a different

reservoir each spring while maintaining levels in the other reservoirs.[3] In accordance with the Master Manual and the 2002-2003 Annual Operating Plan ("AOP") developed under the Manual, the Corps determined it necessary to release water in the spring of 2002 from Lake Oahe in South Dakota to maintain downstream uses, including navigation and power production. *See Id.* at 1021.

Oahe Dam and Lake Oahe, as managed by the Corps under the Master Manual, support a recreational fishery. Thus, while the Dakotas previously endorsed the Corps' plan of "unbalanced" regulation, South Dakota changed course when it became apparent that such releases would prevent a successful smelt spawn in the Lake. Because smelt are a preferred prey fish of the sport fish, walleye, South Dakota feared a reduced smelt spawn would harm its walleye fishery and decrease recreational revenues at the Lake. Accordingly, South Dakota filed an action on April 25, 2002 seeking a temporary restraining order and preliminary injunction to prevent releases required under the Master Manual. After a hearing, the South Dakota District Court entered a temporary restraining order requiring the Corps to maintain lake levels until a preliminary injunction hearing could be held.

Before the next hearing, South Dakota amended its complaint to expand its request for injunctive relief to include Lake Francis Case. Nebraska and others moved to intervene, explaining that, in light of the main stem system's integrated operations, an injunction limiting

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[3] The Corps refers to this method of reservoir management as "unbalanced" reservoir regulation.

releases from additional reservoirs would ultimately paralyze the Corps' operation of the system. Nebraska warned of flow reductions that would prevent Nebraska's power plants from operating, reduce hydropower benefits during key summer months, harm Nebraska's recreation industry, create the threat of stranded barges, and harm Nebraska's municipal drinking water supplies. Nevertheless, the South Dakota Court granted the expanded injunction as to both South Dakota reservoirs and denied Nebraska's motion to intervene on May 10, 2002.

As explained by the Eighth Circuit Court of Appeals: "The South Dakota Court's injunction had a cascading effect. To cope with the injunction, the Corps planned to lower Lake Sakakawea, which is located in North Dakota. The State of North Dakota brought suit in the federal District Court in North Dakota to enjoin the Corps from lowering this reservoir. The District Court entered a temporary restraining order on Sunday, May 12, [2002] which required the Corps to maintain [Lake Sakakawea's] water level." 330 F.3d at 1021-22. The Corps then attempted to lower Fort Peck Reservoir in Montana, but the State of Montana followed suit and, on May 13, 2002, obtained yet another injunction barring releases from Fort Peck Reservoir.

Left with no alternative, Nebraska filed suit in the Nebraska District Court on May 13, 2002 and obtained an injunction requiring the Corps to operate the main stem dams and reservoirs in strict accordance with the FCA, the Master Manual and the operative AOP. The Nebraska Court explained it was "reluctant to interfere with the discretion of the Corps, but must recognize that the court orders in other jurisdictions designed to safeguard interests of upstream uses are quickly stripping the Corps of

Engineers of its ability to function as an objective steward of the water flows of the Missouri River Basin." 330 F.3d at 1022.

The Corps immediately appealed to the Eighth Circuit Court of Appeals the judgment of each District Court. Nebraska and the other proposed intervenors appealed the orders denying intervention.

While the cases were pending before the Eighth Circuit Court of Appeals, Nebraska filed a motion before the Judicial Panel on Multidistrict Litigation seeking to transfer the underlying actions, along with four other actions arising out of the Corps' Missouri River operations, to a single district court for consolidated proceedings. Within hours of oral argument on Nebraska's motion, and over the objections of the Dakotas and the State of Missouri, the Panel granted the motion and ordered the cases transferred to Judge Paul A. Magnuson in the District Court for the District of Minnesota. The consolidated cases are now proceeding before that court as *In re Operation of the Missouri River System Litigation*, 03-MD-1555. Motions for summary judgment have been filed and are awaiting decision on various issues arising under the FCA, the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, and the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.*

III. THE ISSUES PRESENTED TO AND DECIDED BY THE EIGHTH CIRCUIT COURT OF APPEALS.

The issue before the Eighth Circuit Court of Appeals was the validity of the various District Court injunctions discussed above, as well as the South Dakota District Court's denial of intervention. After holding that the South

Dakota District Court had improperly denied intervention to the State of Nebraska, 330 F.3d at 1026, the Eighth Circuit Court of Appeals proceeded to address the merits of the injunctions.

Each case was a challenge to the Corps' actions. The Court of Appeals' review was guided by the Administrative Procedure Act ("APA"). 330 F.3d at 1027. Before assessing the propriety of the Corps' actions under 5 U.S.C. § 706(2)(A), however, the Court of Appeals first disposed of the Corps' argument that its operations were unreviewable. *Id.* The Eighth Circuit concluded otherwise, holding:

> Because the language and context of the Master Manual and the Corps's treatment of the manual indicate that it binds the Corps, we conclude that it is binding. The Corps is not free to ignore the Master Manual (though it may elaborate upon details of operation in its annual operating plans), and courts can review the Corps's actions to ensure conformity. In the end, then, there is sufficient law to apply in these cases. In each case, courts can assess whether the Corps's actions run afoul of either the Flood Control Act or the Master Manual.

Id. at 1029-30.

Having determined that the Corps' actions were reviewable under the APA, the Court of Appeals proceeded to systematically evaluate the propriety of each District Court injunction. Specifically, the Court of Appeals addressed the parties' likelihood of success on their claims that the Corps' actions were unlawful under the APA's "arbitrary and capricious" review standard in light of the Master Manual's requirements. 5 U.S.C. § 706(2)(A). The

Court first addressed the injunction issued by the South Dakota District Court.

South Dakota claimed entitlement to relief on three grounds:

> First, it alleged that the Flood Control Act requires the Corps to act so as to maximize all interests on the River, including recreation. Second, the State argues that it is entitled to relief because the Corps is judicially estopped to favor navigation over recreation. Finally, South Dakota maintains that the Corps acted arbitrarily and capriciously in favoring navigation over recreation.

Id. 330 F.3d at 1030. The Court held "none of these arguments is likely to succeed on the merits."

With regard to South Dakota's first argument, the Court of Appeals explained "South Dakota's proffered standard – whether the Corps's management of the River maximizes the benefits to all interests – is not the kind of standard that courts regularly employ in reviewing agency action." 330 F.3d at 1030. Citing a basic canon of administrative law, the Court explained "[a]s a general rule, courts defer to agency policy decisions because it is not a court's 'function to substitute [its] judgment for that of the agency.'" *Id.* (citation omitted). The Court "[did] not believe that the portions of the Flood Control Act's legislative history to which South Dakota directs this Court are sufficient to achieve such a radical shift from the normal standard of review." *Id.* On this point, the Court concluded: "Courts are simply not empowered to review every decision of the Corps to ensure that it maximizes the benefits of the River for all interests." *Id.* at 1031. The Court also rejected South Dakota's judicial estoppel theory

finding the Corps had given "equal consideration" to recreation interests, if not equal results. *Id.* at 1031. The Court reviewed the Corps' determination that recreation would not be harmed by unbalanced reservoir regulation and the necessary releases from Lake Oahe, concluded that the Corps had properly considered the impacts of its action, and determined that the Corps' action was reasonable. *Id.*

Ultimately, the Court of Appeals held under 5 U.S.C. § 706(2)(A): "The policy choice that South Dakota is challenging is not arbitrary and capricious. The Corps provided a rational basis for its decision to lower one reservoir per year during drought conditions. . . . This plan was eminently rational." 330 F.3d at 1032.

The Court of Appeals then analyzed North Dakota's claims. Characterizing them as "quite similar to those made by South Dakota," the Court did not again address the State's claims of judicial estoppel or that the Corps' actions were arbitrary and capricious. 330 F.3d at 1032. The Court independently addressed only North Dakota's claim that the "Flood Control Act itself precludes the Corps from favoring navigation over recreation." *Id.* The Court of Appeals held: "This argument is simply incorrect; the Flood Control Act does not require the Corps to give equal treatment to recreation." *Id.* Citing this Court's decision in *ETSI Pipeline*, the Court of Appeals explained that the Corps' prioritization of navigation over recreation was "not impermissible." *Id.*

With regard to the Nebraska District Court's injunction, the Court of Appeals held:

> The preliminary injunction entered in the Nebraska District Court was wholly different from

> those entered in North Dakota and South Dakota. The Nebraska District Court ordered the Corps to abide by the Master Manual because it concluded that the Manual binds the Corps. We can find no error with this conclusion. The Master Manual does bind the Corps, and under 5 U.S.C. § 706, Nebraska was entitled to an order that the Corps abide by its own formally adopted policies.

330 F.3d at 1033.

REASONS FOR DENYING THE PETITION

Supreme Court Rule 10 states "[a] petition for writ of certiorari will be granted only for compelling reasons." The Rule illuminates the "character of the reasons" a petition might be granted, including the existence of a conflict between the circuit courts, of a conflict created by a state supreme court decision, or a decision determining an important Federal question for the first time or in a manner contrary to this Court's prior decisions. *Id.* The Dakotas' Petition has none of these characteristics.

As explained below, the Question Presented, as articulated by the Dakotas, was not passed upon below. The Eighth Circuit Court of Appeals correctly decided the discrete issues before it. The decision below was consistent with this Court's prior decisions and created no conflict between the circuits. The Dakotas improperly seek to expand this Court's review beyond the issues decided below and, ultimately, request review of Congressional choices reflected in the FCA. A petition for certiorari is not the appropriate vehicle for the Dakotas' cause.

I. THE QUESTION PRESENTED WAS NOT PASSED UPON BELOW.

The "traditional rule" of this Court precludes a grant of certiorari when the question presented "was not pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41, 112 S.Ct. 1735, 1738 (1992). The Question Presented seeks review of the following issue:

> Whether the 1944 Flood Control Act allows the Corps of Engineers to consistently allocate the water from the Missouri River's upper basin reservoirs to serve downstream navigation at the expense of upstream fish, wildlife and recreation?

Petition at (i). The Dakotas improperly aggrandize the issue decided by the Court of Appeals. That Court simply did not decide the Question Presented.

The Court of Appeals held that the Master Manual is binding on the Corps and that, as a result, there was "law to apply" for purposes of judicial review of the Corps' Missouri River operations. 330 F.3d at 1029. Thus, the Dakotas' characterization of the impetus for this action as a "decision" by the Corps to "sacrifice upstream fisheries by destroying the smelt to satisfy the demands of the dwindling navigation industry" is inaccurate. Petition at 9. The Corps' "decision" was pre-determined by law. The Corps was bound, under the pre-existing terms of the Master Manual and its unbalanced reservoir regulation regime to release water from Lake Oahe as scheduled to meet all of the authorized uses downstream, including water supply and power generation. The Corps simply lacked discretion to retain water upstream at the expense of downstream uses.

Evaluating, under the APA's arbitrary and capricious standard, the Corps' 2002 operations against the FCA and Master Manual's requirements, the Court of Appeals concluded that the Corps did not act improperly. *E.g.*, 330 F.3d at 1032. Further, the Court rejected South Dakota's contention that the Corps must "balance the interests each year so as to maximize each category of benefits" and that the Corps' balancing was reviewable to ensure maximization. 330 F.3d at 1030-31. The Court also held that "the Flood Control Act does not require the Corps to give equal treatment to recreation," and that the Corps' decision to elevate flood control and navigation was consistent with this Court's decision in *ETSI Pipeline*. 330 F.3d at 1032.

The decision below represented a straightforward application of 5 U.S.C. § 706(2)(A). There is nothing unique about the Court of Appeals' review of agency action under the APA. Contrary to the Dakotas' characterization, the Eighth Circuit simply did not rule that the FCA "requires that the Corps must generally favor stagnant downstream navigation over thriving upstream recreation." Petition at (i). Nor did the Court of Appeals hold that the FCA allows the Corps to "consistently allocate" Missouri River water from the upper to lower basin at the expense of upstream interests. The Court of Appeals simply held that the Corps' 2002 operations were reasonable considering the Corps' mandates under the FCA and the Master Manual. The Appellate Court's rejection of the Dakotas' proffered standard against which to measure the Corps' performance (which would erroneously require the Corps to maximize recreation uses) does not equate to a holding that the Corps can "sacrifice upstream fisheries" to serve "the dwindling navigation industry." Petition at 9.

The Question Presented was not decided by the Eighth Circuit Court of Appeals. The Dakotas' Petition should, therefore, be denied.

II. THE ISSUE ACTUALLY PRESENTED BELOW WAS CORRECTLY DECIDED.

The Eighth Circuit Court of Appeals correctly rejected the Dakotas' basic premise, that the FCA requires the Corps to "equitably balance the uses to which the river is put." Petition at (i). This Court previously explained that the "dominant function" to which the Corps-operated facilities are to be devoted under the FCA is flood control and navigation. *ETSI Pipeline*, 484 U.S. at 512, 108 S.Ct. at 815. While Congress permitted secondary uses, including recreation, to be served, such uses were to be at all times subservient to flood control and navigation.

The Dakotas' argument that Congress, in the FCA, did not prioritize the uses to which the waters of the Missouri River are to be placed is simply incorrect. *See* Petition at 4. Section 4 of the FCA states: "The water areas of all such reservoirs shall be open to public use generally, without charge, for boating, swimming, bathing, fishing, and other recreational purposes . . . ***when such use is determined by the Secretary of War not to be contrary to the public interest.***"[4] *Id.* (Emphasis supplied.) There is no such "public interest" limitation on any other authorized use. The Corps implements this significant limitation by

[4] The Dakotas ignore this important modifier in Section 4 when they discuss the FCA's provision for conditional recreation uses. Petition at 17.

requiring the operation of the main stem dams to provide for recreation "insofar, as possible without serious interference" with the other project purposes. Master Manual, § IX, ¶ 9-3. Congress intended this public interest limitation to subjugate recreational sport fishing to other project purposes. Recreation is not entitled to "parity" with flood control and navigation. Petition at 16.

Similar prioritization appears throughout the FCA. For example, Section 6 of the FCA states in part:

> That the Secretary of War is authorized to make contracts with States, municipalities, private concerns, or individuals, at such prices and on such terms as he may deem reasonable, for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the War Department: *Provided*, That ***no contracts for such water shall adversely affect then existing lawful uses of such water***. . . .

(Last emphasis supplied). Section 8 (in its amended form, now 43 U.S.C.A. § 390)[6] reads:

> Dams and reservoirs operated under the direction of the Secretary of the Army may be utilized after December 22, 1944, for irrigation purposes only in conformity with the provisions of this section, but ***the foregoing requirement shall not***

[6] Section 8 in its original form declared in part: "Dams and reservoirs operated under the direction of the Secretary of War may be utilized hereafter for irrigation purposes only in conformity with the provisions of this section, ***but the foregoing requirement shall not prejudice lawful uses now existing***. . . ." (Emphasis supplied).

> ***prejudice lawful uses now existing***. . . . In the case of any reservoir project constructed and operated by the Corps of Engineers, the Secretary of the Army is authorized to allocate water which was allocated in the project purpose for municipal and industrial water supply and which is not under contract for delivery, for such periods as he may deem reasonable, for the interim use for irrigation purposes of such storage until such storage is required for municipal and industrial water supply. ***No contracts for the interim use of such storage shall be entered into which would significantly affect then-existing uses of such storage.***

(Emphasis supplied).

Likewise, the Dakotas' summary of the Pick and Sloan plans and the joint committee report reconciling the two is incomplete and misleading. Nebraska does not dispute that these documents reflect an understanding that recreation and wildlife interests would benefit from the construction and operation of the overall project which, as envisioned, included hundreds of Bureau of Reclamation facilities off of the main stem Missouri River. However, when read in context, it is clear that Congress understood these benefits would accrue not by design, but by incident. More importantly, when speaking directly to use of the main stem reservoirs at issue here, their intended purpose is clear.

The committee report states:

> The use of the Garrison, high Oahe, Big Bend, Fort Randall, and Gavins Point Dams and Reservoirs as outlined above and agreed upon in the joint engineering report will provide the desired degree of flood control, supply the needs of

> irrigation as well as furnish cyclic storage for navigation during prolonged drought periods.

S. DOC. NO. 247 at 3-4. The Sloan Plan similarly states, with regard to the reservoirs at issue:

> This basin-wide plan provides for a number of reservoirs on the upper reaches of the Missouri River and its tributaries, for the purposes of storing water, and releasing it during periods of low flow. Such reservoirs will contribute to flood control not only on the lower river but at all points from the mouth of the river to the reservoir sites; they will aid navigation on the lower river by reducing flood damages to navigation works and by increasing the dry-season flow; they will enlarge the supply of water available for irrigation; and they will make practicable the generation of electrical energy at many places.

S. DOC. NO. 191, 78th Cong., 2nd Sess. (May 5, 1944) at 17-18. The Sloan Plan states that the water stored in Oahe Reservoir "will be available for navigation purposes on the lower river" and that ample storage capacity will be provided to reduce downstream flood flows from Sioux City to Kansas City. *Id.* at 116. It further states, "[a]s the flow of the river at Oahe is to be regulated to permit downstream navigation, large outflows will be required during the navigation season, from March 15 to November 15 of each year." *Id.* Interpreting Pick, the Sloan Plan notes that on the main stem of the Missouri River, the Corps intends to create storage "at the Garrison, Oak Creek, Oahe, Fort Randall, and Gavins Point sites for flood control, navigation, power production, and irrigation purposes." *Id.* at 121.

Both the Pick and Sloan Plans generally refer to benefits accruing to recreation and wildlife. When discussing the fundamental need for the project, however, the Pick Plan clearly explains:

> Flood control and the conservation of water resources are urgently needed in the Missouri River basin. The water that now produces floods should be stored and put to beneficial use in the interest of navigation, power development, irrigation, and other useful purposes.

H. DOC. NO. 475, 78th Cong., 2nd Sess. (March 2, 1944) at 17. The Sloan Plan provides:

> The boundaries of this subdivision [Fort Peck to Sioux City] of the Missouri River basin have been drawn to include all areas in which water from the main stream below Fort Peck can be utilized for irrigation, flood control, power generation, municipal water supply, or other miscellaneous purposes. Until 1940, practically none of its waters were being so used. As an economic or social resource, the Missouri has been a menace rather than a valuable asset.

S. DOC. NO. 191 at 96. Neither the authors of these respective plans, nor Congress upon their approval, could have intended that "other miscellaneous" and "other useful" purposes would be given co-equal status with the enumerated purposes of flood control, navigation, power generation and water supply.

In sum, the Pick and Sloan Plans recognized that construction and operation of main stem dams and reservoirs would incidentally create recreation and wildlife opportunities. But, the Plans do not contemplate operation of reservoirs or other facilities for the express purpose of

promoting such interests to the exclusion of flood control, navigation, power generation or water supply. At base, the Pick-Sloan architects recognized "[a]ll these reservoirs will serve one fundamental purpose, namely, that of impounding water in periods of heavy run-off from the land, and releasing it during periods of low stream flow." S. DOC. NO. 191 at 21. The notion that any of the main stem reservoirs should be operated to retain water upstream in satisfaction of incidental recreational interests to the exclusion of enumerated downstream uses is simply inconsistent with the plan approved by Congress in 1944.

Within the context of the foregoing, Congress instructed the Secretary of War to prepare regulations to implement the Flood Control Act. Section 7 of the Act directed in part:

> Hereafter, it shall be the duty of the Secretary of War to prescribe regulations for the use of storage allocated for flood control or navigation at all reservoirs constructed wholly or in part with Federal funds provided on the basis of such purposes, and the operation of any such project shall be in accordance with such regulations. . . .

In contrast to Section 4, which authorized recreational use of the reservoirs "under such rules and regulations as the Secretary of War may deem necessary," Section 7 required the Secretary of War to prescribe regulations for the use of storage allocated for the dominant project functions of flood control and navigation, and mandated that the projects be operated in compliance with those regulations. The Corps, in promulgating and administering the Master Manual and Annual Operating Plans, has given effect to the will of Congress. The Master Manual

conforms to the objectives and specific provisions of authorizing legislation, as required by 33 C.F.R. § 222.5(f)(1).

Consistent with the FCA, the Master Manual recognizes that fishery and recreation uses are subordinate to other purposes. For example, Section IX, ¶ 9-3 states that "insofar as possible without serious interference with the foregoing functions [flood control, irrigation, municipal and industrial and water quality, navigation and power], the reservoirs will be operated for maximum benefit to recreation, fish and wildlife." Section IX, ¶ 9-35 states that "[w]hile manipulation of the levels of larger reservoirs (Fort Peck, Garrison, and Oahe) to enhance this function [outdoor recreational pursuits] is not practical, recreation will be recognized during periods of system storage drawdown by maintenance of balanced storage within these two [sic] projects to the extent practical."

That the upper basin reservoirs must fluctuate to meet authorized downstream uses is a truism applicable to all reservoirs and of which the Dakotas have been aware for decades. The Master Manual specifically explains the fact that it is not possible to operate each reservoir each year for optimum fish management. Section IX, ¶ 9-38 of the Master Manual states that "it must be recognized that some fluctuation in the reservoir levels is unavoidable if the reservoirs are to perform functions for which designed. A continuing objective in regulation of the system is to minimize departures in pool elevation from normal full multi-purpose levels to the maximum practical extent consistent with other project functions." Section IX, ¶ 9-31 states:

> The Federal and state fish and wildlife agencies recognize that it is not possible to operate each

> reservoir each year for optimum fish management and have indicated that a good spawn of a fish species 1 year out of 4 or 5 is adequate to maintain the fishery resource in a specific reservoir. Therefore, one or more reservoirs may be selected each year for emphasis in the enhancement of fish management and, to the extent that inflows and regulation requirements for other purposes permit, the selected projects are regulated to improve the fishery resource.

The Dakotas contend "[t]he critical conclusion of the court below was that the 1944 Flood Control Act obligates the Corps to give priority to flood control and navigation." Petition at 25. However, as discussed above, the Eighth Circuit actually held that the Master Manual was binding on the Corps, a holding with regard to which the Dakotas allege no error. Once the Court determined that the Master Manual was binding, it evaluated the Corps' decision to release water from the upstream reservoirs to meet authorized project purposes downstream in light of the Corps' authorities under the FCA and the Master Manual. Accordingly, the Eighth Circuit concluded that the Corps' releases were not arbitrary and capricious under 5 U.S.C. § 706(2)(A).

In light of Congressional intent apparent from the language of the FCA, and as Congress' directives have been implemented by the Corps in its Master Manual for over 40 years, the Eighth Circuit correctly concluded that the Corps' actions were reasonable. To the extent the Dakotas seek to force revision of the Corps' operations under the Master Manual, such action amounts to an untimely challenge to the Manual itself and a collateral attack on this Court's decision in *ETSI Pipeline*.

III. THE DAKOTAS ASK THE COURT TO REVIEW AND JUDGE THE WISDOM OF CONGRESS' CHOICES UNDER THE FCA.

By this action, the Dakotas seek judicial review of the wisdom of Congressional choice reflected in the FCA and implemented through the Master Manual. The Dakotas begin their Statement of this case by explaining:

> This case is about the fair division of Missouri River waters among the seven states through which it flows. It is about whether those states – Montana, North Dakota, and South Dakota – that sacrificed the most to protect the entire basin from floods are to be allowed an appropriate measure of benefit from federal dams and reservoirs. . . .

Petition at 2. This, of course, reveals the true nature of what the Dakotas seek here – equitable relief designed to effectively allocate the waters of the Missouri River.

The Dakotas ask this Court to rewrite the historical development of the Upper Basin. They ask the Court make up for lost opportunities and benefits once foreseen but never derived. They argue certiorari should be granted in light of the Federal government's role in developing the Missouri River Basin, and because the "magnitude of the federal impact alone merits this Court's attention." Petition at 15. They further question the ability of Corps to execute Congressional mandates impacting civilian interests. *Id.* None of these arguments, individually or collectively, is sufficient to support the grant of certiorari.

According to the Dakotas, they "were promised, in return for the presence of huge reservoirs within their borders, large irrigation projects. These promises remain

unfulfilled." Petition at 2. The Dakotas lament "their sacrifices," Petition at 7, and decry the Upper Basin has been "short-changed." *Id.* at 8. The litigants, of course, may debate the Dakotas' account of the Basin's development. This is especially true in light of the fact that the very industries the Dakotas seek to enhance in this case were created in the first instance by construction of the main stem reservoirs and operations under the Master Manual. As even the Dakotas recognize, "[t]he economic value provided by Missouri River recreation is exceptional . . . . " *Id.* Nevertheless, in the Dakotas' view, that value "has not attained its full potential."

Thus, the Petition is about maximizing the Dakotas' interests at the expense of established downstream uses authorized by Congress and reliant on the Corps' existing operations. It is about making up for opportunities lost. To the extent the Dakotas believe their interests are not adequately represented, the Dakotas may seek relief from Congress or attempt to invoke the original jurisdiction of this Court. A petition for certiorari is an improper means to achieve what the Dakotas seek. Their Petition is misplaced and should be denied.

CONCLUSION

The Petition asks this Court to review the wisdom of Congressional choices made decades ago. Properly cast, it is little more than an appeal from a relatively straightforward application of the APA to the Corps' reservoir management under the Master Manual. The Master Manual properly implements the will of Congress as reflected in the FCA. The Corps is bound by the Master Manual, and

reservoir operations conducted pursuant to its express terms are neither arbitrary nor capricious. The Question Presented, designed to reassess Congressional choices reflected in the FCA, was neither pressed nor passed upon in the court below. Certiorari should not be granted.

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No. 03-935

In the Supreme Court of the United States

NORTH DAKOTA, ET AL., PETITIONERS

v.

KURT F. UBBELOHDE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in reversing two preliminary injunctions that required the United States Army Corps of Engineers to maintain water levels in certain reservoirs in the Missouri River Main Stem Reservoir System during the smelt-spawning season of Spring 2002.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-34) is reported at 330 F.3d 1014. The order of the district court for the District of South Dakota granting the State of South Dakota a temporary restraining order prohibiting the lowering of water levels in Lake Oahe (Pet. App. 35-48) is unreported. The order of the district court for the District of South Dakota granting South Dakota a preliminary injunction prohibiting the lowering of water levels in Lake Oahe and Lake Francis Case (*id.* at 49-63) is unreported. The order of the district court for the District of North Dakota granting the State of North Dakota a temporary restraining order prohibiting the lowering of water levels in Lake Sakakawea (*id.* at 64-65) is unreported.

The order of the district court for the District of North Dakota entering a preliminary injunction prohibiting the lowering of water levels in Lake Sakakawea (*id.* at 69-71) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 2003. Petitions for rehearing en banc were denied on September 30, 2003 (Pet. App. 82). The petition for a writ of certiorari was filed on December 29, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a series of temporary restraining orders (TROs) and preliminary injunctions issued by the federal district courts of North Dakota, South Dakota, and Nebraska involving the operation of dams and reservoirs along the Missouri River controlled by the United States Army Corps of Engineers (the Corps). The TROs and preliminary injunctions issued by the North Dakota and South Dakota district courts prohibited the Corps from lowering water levels in certain Missouri River reservoirs within those States. The preliminary injunction issued by the Nebraska district court required the Corps to maintain certain minimum water flows in the Missouri River. The court of appeals reversed the preliminary injunctions entered by the North Dakota and South Dakota district courts and remanded for further proceedings, but affirmed the preliminary injunction issued by the Nebraska district court. Pet. App. 1-34.

1. Congress enacted the Flood Control Act of 1944 (Flood Control Act or Act), ch. 665, 58 Stat. 887, to provide for the comprehensive management of the waters of the Missouri River Basin. The Act and other

legislation authorized the Corps to build and operate a series of six dams and associated reservoirs comprising the Missouri River Main Stem System of Reservoirs (Main Stem System), which are situated in North Dakota, South Dakota, Nebraska, and Montana.[1] The Act authorizes the Corps to contract for the use of surplus water available at the reservoirs, 33 U.S.C. 708, and to "prescribe regulations for the use of storage allocated for flood control or navigation at all reservoirs," providing that "the operation of any such project shall be in accordance with such regulations." 33 U.S.C. 709. The Act and its legislative history identify purposes that the Corps is to serve in operating the Main Stem System, including flood control, the provision of hydropower, irrigation, recreation, navigation, water supply and water quality, recreation, and the preservation of fish and wildlife. Pet. App. 4-5, 102.

The Corps has developed a water control plan for operation of the Main Stem System that is designed to serve the congressionally identified purposes of the Act. The guidelines used in the execution of that water control plan are embodied in the Missouri River Main Stem Reservoir System Master Reservoir Regulation Manual, commonly known as the "Master Manual." Pet.

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[1] The six Main Stem System dams are as follows, with the associated reservoirs identified in parentheses: Garrison Dam (Lake Sakakawea), Oahe Dam (Lake Oahe), Big Bend Dam (Lake Sharpe), Fort Randall Dam (Lake Francis Case), Gavins Point Dam (Lewis and Clark Lake), and Fort Peck Dam (Fort Peck Lake). Congress authorized construction and operation of the Fort Peck Dam in Montana in the earlier River and Harbor Act of 1935, ch. 831, 49 Stat. 1028, for the purpose of flood control and navigation. Its authorization was amended in 1938 to add the purpose of providing hydroelectric power. See Act of May 18, 1938, ch. 250, 52 Stat. 403.

App. 6. The Master Manual was first published in 1960, and the current version was issued in 1979. *Id.* at 37. The 1979 Master Manual sets forth the Corps' general approach for operating the reservoirs, which calls for it to consider the congressionally identified interests in making operational decisions. *Id.* at 6. The 1979 Master Manual sets forth a "general approach" of priorities for the interests served by the Main Stem System. Master Manual § 9-3, pp. IX-1. It gives flood control the highest priority, followed in order by irrigation (and "other upstream water uses for beneficial consumptive purposes"), downstream water supply and water quality requirements, navigation and power, recreation, and fish and wildlife. *Id.* at IX-1 to IX-2; see Pet. App. 32. The Corps has for several years been preparing an updated version of the Master Manual. In addition, each year, the Corps promulgates an Annual Operating Plan (AOP), which sets forth its plans on how it will operate the Main Stem System for that coming year. The Corps develops each year's AOP in cooperation with federal and state agencies, local governments, and citizens in an effort to address the multiple purposes for which it operates the Main Stem System. Pet. App. 7. Because of limitations on long-term weather forecasting, each year's AOP lays out alternative plans for operation of the System depending on the amount of carry-over storage in the reservoirs and the precipitation the Missouri River Basin receives.

2. The dispute in this case arose out of the prolonged drought conditions that the Missouri River Basin has experienced over the last several years. The shortage of water has required the Corps to make decisions about the allocation of water among competing interests (Pet. App. 3, 7), and to design a plan of operations that satisfied to the greatest extent the competing

purposes of the Flood Control Act. In drought years, the Corps generally tries to maintain steady or rising water levels in five of the six Main Stem System reservoirs while drawing down water in one of the three largest reservoirs (Lake Sakakawea, Lake Oahe, and Fort Peck Lake) to ensure that enough water is in the Missouri River to support downstream uses, including navigation, water supply, and water quality (*i.e.* sanitation) requirements. *Id.* at 7, 29, 31. The Corps generally attempts to shift the burden of supplying downstream needs between reservoirs from year to year during drought periods. *Id.* at 7. In the 2002 AOP, the Corps decided to provide for downstream uses by releasing water from Lake Oahe in South Dakota, the second-largest reservoir in the System, see *id.* at 5, because that reservoir's water level had not been reduced the previous year (indeed, it had increased). *Id.* at 7.

a. South Dakota informed the Corps that it believed that declining water levels at Lake Oahe would harm the spawn of the rainbow smelt, a prey species that provides an important source of food for walleye, a popular trophy fish in the lake. Pet. App. 7-8. South Dakota claimed that losses to smelt would in turn inhibit the growth of walleye stocks, and would harm economic interests by reducing recreational fishing on the lake. *Ibid.* The Corps declined to alter its AOP either by drawing down another reservoir or by curtailing the navigation season on the Missouri River. On May 2, 2002, South Dakota obtained a temporary restraining order from the district court for the District of South Dakota, which prohibited the Corps from lowering water levels at Lake Oahe until May 11, 2002. *Id.* at 35-48. The order emphasized that the TRO affected only Lake Oahe and that "[i]f the Corps desires

to draw down other reservoirs, it is free to do so." *Id.* at 47. The Corps then began drawing down Lake Francis Case, also in South Dakota, to provide for downstream uses. *Id.* at 50.

On May 13, 2002, after a hearing, the court issued a preliminary injunction prohibiting the Corps from lowering the water levels of both Lake Oahe and Lake Francis Case until May 25, 2002. Pet. App. 49-63. The court concluded that South Dakota had shown a likelihood of success on the merits on two arguments: first, that judicial estoppel supported issuance of an injunction, based on the argument that the Corps had represented to the district court for the District of Montana during litigation in the early 1990s that the Corps would give equal weight to all water uses and not favor navigation, and that in choosing to draw down Lake Oahe and Lake Francis Case the Corps allegedly had failed to abide by that representation (Pet. App. 56-57); and second, that the Corps' decision to provide for "a full eight month [navigation] season" at the expense of upstream fisheries of arguably greater economic value "may well be arbitrary and capricious" (*id.* at 59) and thus violative of the Administrative Procedure Act, 5 U.S.C. 706. The court stated that it believed the Corps' decision was "largely due to the Corps' reliance on out-dated and inaccurate information to guide its operations," specifically the 1979 Master Manual, which, it observed, "has been for years in need of substantial revision."[2] Pet. App. 57-58.

b. The South Dakota TRO had a "cascading effect." Pet. App. 9. To provide for downstream uses in light of

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[2] Before the hearing on the preliminary injunction, the State of Nebraska and several private entities had moved to intervene in the case, but the district court denied intervention. Pet. App. 9.

restrictions on Lake Oahe, the Corps planned to draw down Lake Sakakawea in North Dakota, the largest reservoir in the Main Stem System. Pet. App. 5. The State of North Dakota then brought suit in the district court for the District of North Dakota seeking to enjoin the Corps from lowering that reservoir. The district court entered a TRO on May 12, 2002, requiring the Corps to maintain that lake's water level for a period of ten days. *Id.* at 64-65. When the TRO expired, the court converted it, with the agreement of the parties (who reserved the right to appeal), into a preliminary injunction that would expire on May 25, 2002. *Id.* at 66-71. The Corps then planned to accommodate downstream interests by lowering Fort Peck Lake in Montana, but the State of Montana, on May 13, 2002, obtained a TRO from the district court for the District of Montana prohibiting the Corps from increasing releases of water from that reservoir for a period of ten days.[3] See *id.* at 9 n.2; *id.* at 72-74.

c. After the South Dakota district court denied the State of Nebraska permission to intervene in the lawsuit involving Lake Oahe and Lake Francis Case, see note 2, *supra*, Nebraska sought injunctive relief from the district court for the District of Nebraska in an effort to ensure the maintenance of minimum water flow rates in the Missouri River necessary for navigation. On May 13, 2002, that court issued a preliminary injunction requiring the Corps to "maintain the

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[3] Because of the great distances involved, it was unclear whether water released from Fort Peck Lake could reach the navigable part of the Missouri River before the North Dakota and South Dakota injunctions expired. Accordingly, the Corps did not appeal the preliminary injunction entered in Montana, and Montana did not further pursue its case against the Corps. Pet. App. 9 n.2.

minimum navigation flows below Gavins Point Dam," the most downsteam dam in the Main Stem System, "as identified in the 1979 Master Manual and current [AOP]." Pet. App. 80-81. The district court stated that it was "reluctant to interfere with the discretion of the Corps, but must recognize that court orders in other jurisdictions designed to safeguard interests of upstream water users are quickly stripping the Corps of Engineers of its ability to function as an objective steward of the water flows in the Missouri River Basin." *Id.* at 80. This series of injunctions and TROs left the Corps able to use water from only the two smallest reservoirs in the Main Stem System to maintain water flows sufficient for navigation and other downstream uses. See *id.* at 10.

3. Faced with the need to comply with potentially conflicting injunctions, on May 17, 2002, the Corps filed a motion for a stay of the North Dakota, South Dakota, and Nebraska injunctions pending appeal. On May 22, 2002—three days before the South Dakota and North Dakota injunctions were to expire by their own terms—the court of appeals granted the Corps' motion. Pet. App. 10.

4. The court of appeals reversed the South Dakota and North Dakota injunctions and remanded those cases for further proceedings, but it affirmed the Nebraska injunction. Pet. App. 1-34. The court did not address at length the irreparable injury, balance of harms, or public interest considerations bearing on the propriety of the preliminary injunctions, concluding that "[t]he dispositive issue * * * is the likelihood that each plaintiff would succeed on the merits." *Id.* at 20.

a. The court first rejected the Corps' argument that determinations about the operation of the Main Stem System were committed to agency discretion by law

under 5 U.S.C. 701(a)(2) and therefore were not subject to judicial review. Pet. App. 20-26. While agreeing that the Flood Control Act "clearly gives a good deal of discretion to the Corps in the management of the River," *id.* at 21, the court held that such "discretion is not unconstrained" because the Act "lays out purposes that the Corps is to consider in managing the River," *ibid.* Because the Flood Control Act "calls upon the Corps to balance" the interests of "flood control, navigation, recreation, and other interests," the court of appeals concluded that courts "can review the Corps's decisions to ensure that it considered each of these interests before making a decision." *Ibid.* The court further concluded that the "minimal guidance provided by the Flood Control Act," *id.* at 22, does not provide "a method of deciding whether the balance actually struck by the Corps in a given case is correct or not," *id.* at 21. But the court noted that the 1979 Master Manual "sets out priorities and directs the Corps to take certain actions in given situations." *Id.* at 22. The court held that the 1979 "Master Manual is binding on the Corps because it sets out substantive requirements, and its language and context indicate that it was intended to bind the Corps's discretion." *Ibid.* Because courts could "review the Corps's actions to ensure conformity" with the 1979 Master Manual (*id.* at 26), the court of appeals held that "there is sufficient law to apply" that decisions about the operation of the Main Stem System are not committed to agency discretion by law. *Ibid.*

b. The court of appeals next held (Pet. App. 26-31) that the South Dakota district court erred in issuing the preliminary injunction restraining the Corps from lowering water levels in Lake Oahe and Lake Francis Case because the State of South Dakota was unlikely to succeed on the merits of its claims. The court rejected

South Dakota's claim that the relevant standard in reviewing the Corps' decisions was whether it had "maximize[d] the benefits to all interests" (*id.* at 27), concluding that such a standard is inconsistent with general administrative law principles because it would afford Corps decisions "no deference" and would require review of agency decisions "no matter how minute." *Id.* at 28. The court also rejected the State's reliance on the proposition that "judicial estoppel require[d] the Corps to give equal consideration to recreation and other interests including navigation" because of representations the Corps allegedly had made during previous litigation in the Montana district court. *Ibid.* The court observed that, even assuming that the elements of judicial estoppel were present in this case, "the Corps's decision to lower one reservoir per year during a drought simply does not provide any proof that the Corps was not giving recreation equal consideration" (*id.* at 29-30), because "[e]qual consideration does not mean" that interests in recreation would necessarily prevail. *Id.* at 29; see also *ibid.* (noting that "South Dakota has presented no evidence that the Corps did not give equal consideration to recreation" and that "the Corps maintains that it considered the interests of recreation equally"). Finally, the court explained that the Corps' decision was not arbitrary and capricious under the APA:

> The Corps provided a rational basis for its decision to lower one reservoir per year during drought conditions. The Corps had evidence that every reservoir did not need to have a good spawn each year to maintain the fish stocks. * * * The Corps decided to alternate the harm among the reservoirs, maintaining the water level at all but one reservoir

> each year. This plan would presumably allow each reservoir to have a fruitful spawn five out of every six years even in the worst drought conditions.[4] This plan was eminently rational.

Id. at 30-31.

For similar reasons, the court concluded that "the North Dakota District Court erred in entering a preliminary injunction" in favor of North Dakota, Pet. App. 32, rejecting the "quite similar" (*id.* at 31) arguments North Dakota had proffered in defense of that injunction. The court remanded both the South Dakota and North Dakota cases to their respective district courts for further proceedings.[5] *Id.* at 31, 32.

c. Finally, the court of appeals held that the Nebraska district court had properly concluded that the 1979 "Master Manual * * * binds the Corps" and that Nebraska "was entitled to an order that the Corps

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[4] The court of appeals erroneously stated that the Corps rotated among all six reservoirs in the Main Stem System. As explained above, see p. 5, *supra*, the Corps generally alternates among only the three largest reservoirs in the system.

[5] The court concluded that the expiration of the South Dakota and North Dakota preliminary injunctions did not render moot the appeals of those injunctions, because the cases fell within the exception to the mootness doctrine for questions "capable of repetition, yet evading review," Pet. App. 11 (quoting *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975)). The court reasoned that injunctions barring water releases during spawning periods would "never last long enough to allow for full litigation because of the brevity of spawning season," *id.* at 12, and "the questions presented in this appeal are likely to recur" in light of continuing drought conditions along the Missouri River. *Ibid.* The court also concluded that the South Dakota district court had erred in denying the State of Nebraska and private entities intervention. *Id.* at 12-18. Those determinations are not at issue before this Court.

abide by its own formally adopted policies." Pet. App. 32-33. Although it observed that "[p]robably the Corps should be accorded some flexibility" to depart from the 1979 Master Manual "when unforeseen circumstances arise," *id.* at 33, the court "le[ft] such questions to the District Court to decide on remand if necessary." The court vacated its stay of the Nebraska injunction and remanded for further proceedings.

5. Shortly after the court of appeals issued its opinion, the district court for the District of Columbia issued an injunction limiting the Corps' discharge of water from the reservoirs into the lower Missouri River. *American Rivers* v. *U.S. Army Corps of Eng'rs*, 271 F. Supp. 2d 230 (D.D.C. 2003). The court issued that injunction because it had concluded that lower discharges were needed to protect certain species of fish and birds listed as threatened and endangered under the Endangered Species Act. *Id.* at 262-263. That injunction appeared to conflict with the injunction issued by the Nebraska district court, which required higher water flows from the reservoirs to maintain navigation in accordance with the 1979 Master Manual. The Judicial Panel on Multidistrict Litigation subsequently consolidated all of the district court cases addressed by this petition and the *American Rivers* litigation before a single district court in the District of Minnesota for pretrial procedures. *In re Operation of the Missouri River Sys. Litig.*, 277 F. Supp. 2d 1378 (J.P.M.L. 2003). As part of that ongoing litigation, and in order to ensure that any litigation over the Corps' 2004 AOP will be resolved in a timely manner, that district court has ordered the Corps to produce its revised Master Manual (and 2004 AOP) by March 19, 2004. See Memorandum and Order, *In re Operation of the Missouri River Sys. Litig.*, 03-MD-1555 (PAM), at 8

(D. Minn. Feb. 26, 2004). The Corps expects to meet that deadline.

ARGUMENT

Petitioners contend that the court of appeals misinterpreted the Flood Control Act by concluding that it "obligates the Corps to give priority to flood control and navigation" (Pet. 25) at the expense of recreation, and that the Corps has consistently and impermissibly favored navigation at the expense of recreational interests. *Ibid.* Petitioners also claim that "the 1979 *Master Manual* that the Corps uses to manage the river is outdated and requires revision." Pet. 20. Petitioners argue that this Court should grant review "to authoritatively define what priorities bind the Corps of Engineers and the degree of flexibility that it has in applying those priorities." Pet. 27. None of those contentions furnishes a basis for certiorari here. The court of appeals' decision reversing the North Dakota and South Dakota injunctions is correct and does not conflict with any decision of this Court or of any other court of appeals. Review therefore is unwarranted, particularly in view of the interlocutory posture of the case and the Corps' expected issuance of the revised Master Manual addressing the operation of the Main Stem System.

1. Petitioners err in contending that the court of appeals held that "the 1944 Flood Control Act obligates the Corps to give priority to flood control and navigation" (Pet. 25) and that "the Corps has a duty to generally prefer navigation over recreation" (Pet. 21); see also Pet. 19 (stating that the court of appeals' decision "gives a preference to * * * navigation"). The court of appeals' decision does not establish priorities among the interests recognized by the Act

that the Corps must follow in operating the Main Stem System. While the court stated that "[t]he Act recognizes what the Supreme Court has called the dominant functions of the River's reservoir system—flood control and navigation," Pet. App. 21 (citing *ETSI Pipeline Project* v. *Missouri*, 484 U.S. 495, 512 (1988)), see also *id.* at 5, 32, the court did not say that the Act requires that those two functions be given priority at the expense of other functions, including recreation.[6] The court of appeals stated in the very next sentence that "the Act also recognizes recreation and other interests * * * that should be provided for," *id.* at 21, and the court noted that the Corps must "consider[] each of these interests before making a decision." *Ibid.* The court further stated that "the Flood Control Act calls on the Corps to balance these various interests" (*ibid.*), and did not suggest that the Act requires that navigation be favored in that analysis. Indeed, the court pointed out that the Flood Control Act provides only "minimal guidance" (*id.* at 22) and "does not provide * * * a method of deciding whether the balance actually struck by the Corps in a given case is correct or not." *Id.* at 21.

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[6] As petitioners note (Pet. 26), in *ETSI Pipeline*, the Court stated that the Sloan Plan proposed by the Corps before passage of the Flood Control Act "recognized that the 'dominant function' of Lake Oahe and the other main-stem reservoir projects would be flood control and navigation." 484 U.S. at 512. The Court's description of the "dominant function" of the reservoirs under the Sloan plan was relevant in determining whether operation of the Main Stem reservoirs would come within the jurisdiction of the Corps or the Department of the Interior. See *ibid.* The Court did not address the issues in this case concerning the Corps' own balancing of competing uses for water.

Although the court of appeals concluded that the Corps had not acted "impermissibl[y]" (Pet. App. 32) in the 1979 Master Manual by giving navigation priority over recreation, there is no indication the court believed that priority was *required* by the Flood Control Act. Rather, the court noted that "[t]he Flood Control Act provides little guidance about what priority the Corps can or must give to different interests." *Ibid.* While the court noted that "the sequential listing of interests" in the Act, which "uniformly lists navigation before recreation," suggests that "the Corps's primary concerns *should be* flood control and navigation," *ibid.* (emphasis added), the court did not say that the Act requires navigation to be given priority over recreation as a general matter or in all respects much less that the Act itself required the Corps to make the decision it did in 2002 to lower water levels in Lake Oahe. Moreover, the fact that the court noted that "South Dakota has presented no evidence that the Corps did not give equal consideration to recreation" (*id.* at 29; see also *id.* at 29-30 (noting absence of "proof that the Corps was not giving recreation equal consideration" with navigation, and that "the Corps maintains that it considered the interests of recreation equally")) belies petitioners' claim that the court considered the Corps bound under the Act to give priority to navigation over recreation.[7]

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[7] Petitioners err in contending (Pet. 25) that the Corps consistently favors navigation over upstream interests. Since the early 1990s, the Corps has given equal consideration to all the purposes outlined in the Flood Control Act and its legislative history. Petitioners' claim also overlooks the fact that the Corps has, in the past, shortened the navigation season to protect upstream reservoirs during drought years. See, *e.g.*, *Missouri* v. *Craig*, 978 F. Supp. 902, 905 (W.D. Mo. 1997) (suit brought by Missouri challenging Corps' shortening of navigation season),

2. In addition, this Court ordinarily does not review interlocutory decisions of the sort at issue here. *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostock R. R.*, 389 U.S. 327, 328 (1967) (per curiam); *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting denial of certiorari); see generally Robert L. Stern, et al., *Supreme Court Practice* § 4.18, at 258 (8th ed. 2002). Petitioners sought preliminary injunctions to prevent harm to smelt spawns during the pendency of their lawsuits challenging the Corps' plan to lower the water levels in certain reservoirs during the 2002 season. The court of appeals did not render a final judgment on the merits of their suits, which remain pending in district court, but simply determined the propriety of the granting of preliminary injunctions in light of its assessment of petitioners' likelihood of success, and remanded for further proceedings. See Pet. App. 31, 32. See generally *University of Tex.* v. *Camenisch*, 451 U.S. 390, 395 (1981) (noting difference between standard for preliminary injunction and final judgment); *Brown* v. *Chote*, 411 U.S. 452, 456 (1973) (same). Petitioners will be able to seek review of any final judgment entered in those cases. Because the injunctions issued to petitioners have expired by their own terms (see Pet. 13-14), there is no pressing need for this Court to review the court of appeals' decision. The lack of finality of the judgment below is "of itself alone" a "sufficient ground for the denial of the [writ]." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

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vacated as moot, 163 F.3d 482 (8th Cir. 1998); *Missouri* v. *Bornhoft*, No. 92-4206-CV-C-9 (W.D. Mo. Aug. 28, 1992) (same; oral ruling denying preliminary injunction).

3. An additional reason why review is not now warranted is that events likely will substantially affect the future course of legal proceedings concerning the Corps' operation of the Main Stem System. One of petitioners' basic claims is that the 1979 Master Manual places too little emphasis on recreation and too much on navigation. See, *e.g.*, Pet. 20 ("the 1979 *Master Manual* that the Corps uses to manage the river is outdated and requires revision"). Indeed, the South Dakota district court stated, in granting its preliminary injunction, that "[i]t is that [1979] Master Manual which * * * fuel[s] the on-going controversy between the parties" by giving navigation a higher priority than recreation. Pet. App. 37. In accordance with a scheduling order in the consolidated Missouri River litigation of which this case is a part, the Corps expects that it soon will release a revised Master Manual that will supersede the 1979 version. See pp. 12-13, *supra*. The Corps anticipates that the new Master Manual will make important changes. For example, the Corps has proposed in a draft of the new manual that, unlike the 1979 Master Manual, the new manual will not list any specific priorities among the interests recognized by the Flood Control Act, but rather will embody the Corps' current policy of weighing all interests equally and maximizing to the extent possible all interests. That revision, if adopted, would effectively give petitioners the relief they have been seeking—an assurance that "the Corps should 'give all water uses equal consideration'" (*id.* at 15 (quoting First Amended Compl. para. 39, *South Dakota* v. *Ubbelohde*, Civ. 02-3011 (D.S.D. filed Apr. 30, 2002))) in making decisions about the operation of the Main Stem System reservoirs and dams.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2004

Supreme Court, U.S.
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No. 03-935

In the
SUPREME COURT OF THE UNITED STATES

State of North Dakota and
State of South Dakota
Petitioners,

v.

Lt. Col. K.F. Ubbelohde, Dist. Engineer, Omaha Dist., U.S. Army Corps of Engineers; Brig. Gen. W.T. Grisoli, Commander, NW Div., Portland, Or., U.S. Army Corps of Engineers; State of Missouri; and the State of Nebraska; et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Missouri River Master Water Control Manual, promulgated under the Flood Control Act of 1944, Pub.L. No. 78-534, 58 Stat. 887 (1944), is binding on the U.S. Army Corps of Engineers.

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INTRODUCTION AND STATEMENT

Missouri and petitioners North and South Dakota ("the Dakotas") have very different views of the Flood Control Act of 1944 and the substantive meaning of the Missouri River Master Water Control Manual ("Master Manual"), the longstanding rule that sets out the manner in which the United States Army Corps of Engineers ("Corps") is to manage the water system that a series of dams created from the formerly free-flowing Missouri River. The views are largely the result of the dramatically different approaches that Dakota and Missouri citizens have taken to life on the River.

In Missouri, agriculture has flourished along the River. Farmers rely on the dams to prevent flooding of their land and to provide the continuous flows that make it possible to transport bulk materials– including fertilizers and crops–inexpensively. Farmers and shippers make long-term investments premised on the Master Manual, published by the Corps to satisfy the congressional mandate embodied in the Flood Control Act. Each year, in late winter, shippers, warehousemen, and navigators enter into contracts for the delivery of goods on the Missouri River–contracts that necessarily depend on the river flows promised by the Master Manual.

While farming has flourished in Missouri, under the management of the Corps and pursuant to the Master Manual a recreation industry has flourished in the upstream states. Instead of corn and soybeans, the product is tourism revenue, produced in part by fishing

for walleye, a nonnative game fish that feeds on a small forage fish, the rainbow smelt. The smelt spawns in water only inches deep along the shores of the big lakes. The Dakotas tell this Court that the fate of their multimillion dollar recreation industry hinges on this tiny minnow. But like Missouri farmers, those establishing businesses based on walleye fishing in the Dakotas proceed with full knowledge of the Master Manual and the manner in which it requires the Corps to manage the river. And despite their difficulties in 2003, the Dakota businesses have obviously thrived under the Master Manual regime.

This case is one of several in which the interests of the Dakotas and Missouri regarding the Missouri River collide. Those collisions occur as the Corps decides, each year, how (or, but for the decision of the Eighth Circuit here, whether) to implement the criteria established in the Master Manual. Each year, the Corps prepares an Annual Operating Plan to tell river users how it will meet the requirements of the Master Manual, setting out the likely hydrological conditions and how they will affect River management in the next twelve months.

One feature of the Annual Operating Plans is "unbalancing." Unbalancing is the Corps' practice of drawing down one of the three large reservoirs each spring, so that the others may rise and thereby enhance fish spawning success. This well-established practice accommodates, on a rotating basis, the up-stream states' desires for a healthy fish spawn, while ensuring continuous downstream flows.

Pursuant to the Master Manual and the Annual Operating Plan, in 2002 Lake Oahe in South Dakota was scheduled for its routine "unbalancing" drawdown. On April 25, 2002, the State of South Dakota filed suit in the U.S. District Court for South Dakota to stop that process. That court refused to allow the State of Nebraska to intervene or the State of Missouri to appear even as an amicus.[1] The court issued a temporary restraining order prohibiting the Corps from drawing down Lake Oahe.

The Corps turned to Lake Sakakawea in North Dakota to provide the downstream flow required under the Master Manual. On May 12, 2002, the State of North Dakota filed suit in the District of North Dakota and obtained its own restraining order protecting Lake Sakakawea.

The Corps then necessarily looked upstream to Fort Peck Lake in Montana. Predictably, Montana filed suit and duly obtained its own order.[2]

Meanwhile, Nebraska and Missouri, frustrated in their efforts to enter the South Dakota case, filed their own suit in the District of Nebraska. But their claims were remarkably different than the ones pursued in the upstream states. Rather than seek

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[1]The Dakotas appear to concede these errors; in their petition, they do not contest the Court of Appeals decision on the intervention claims.

[2]Montana voluntarily dismissed its action after the Fort Peck spawning season.

relief *from* the Master Manual, as South and North Dakota had done, Nebraska and Missouri sought to *enforce* the Master Manual. The district court agreed, ordering the Corps to operate the Missouri River mainstem reservoirs in accordance with the Master Manual and the Annual Operating Plan so as to provide sufficient releases to maintain navigation and other downstream uses. Despite the district court's order, navigation was severely disrupted at great expense throughout 2003.

The Nebraska, South Dakota, and North Dakota decisions were all appealed to the U.S. Court of Appeals for the Eighth Circuit. On June 4, 2003, the court of appeals affirmed the Nebraska injunction and reversed the South Dakota and North Dakota injunctions. *South Dakota v. Ubbelohde*, 330 F.3d 1014 (8th Cir. 2003) (Petition Appendix (App.) at 1). The court of appeals held that downstream states are entitled to intervene as a matter of right in Missouri River litigation, that the Corps' reservoir operation decisions are subject to judicial review, and that the 25-year-old Master Manual is a binding rule that, until a new manual is promulgated, constrains the Corps' discretion. 330 F.3d at 1033; App. 32-34. The court of appeals denied rehearing on September 30, 2003.

REASONS TO DENY THE WRIT

The question posed by the Dakotas is whether the Eighth Circuit correctly held, consistent with this Court's decision in *ETSI Pipeline Project v. Missouri*, 484 U.S. 495 (1988), that flood control and navigation are the "dominant functions" of the Missouri River

reservoirs, and that those congressional project purposes are entitled to preferential treatment over recreation, a subordinate and ancillary project purpose, in the management of the Missouri River under the Flood Control Act of 1944. Notably, Petitioners do not make a serious attempt to find a conflict between the decision of the Eighth Circuit and any decision by this or any lower court. Nor is a conflict likely.

But equally important, the Dakotas pose the wrong question. They argue the case as if the Flood Control Act itself told the Corps just how to accommodate the different demands for Missouri River water, though they expressly say it did not. They fail to take into account the key role of the Master Manual, both in management of the River and in the court of appeals' decision. The Flood Control Act set out a list of purposes, but it left the balancing largely to the Corps of Engineers. The Corps adopted the Master Manual to set out how it would perform that task, then issued Annual Operating Plans to deal with year-to-year changes in hydrology. Despite Petitioner's belated objection, the court of appeals' decision to require the Corps to adhere to the 25-year-old Master Manual is an unremarkable application of established law that does not merit consideration by this Court.

1. Missing from the petition is the suggestion of any conflict between the decision of the Eighth Circuit and any decision of this Court. Indeed, the petition itself distinguishes this case from the only two in which this Court has addressed the 1944 Flood Control Act, *South Dakota v. Bourland*, 508 U.S. 679 (1993),

and *ETSI Pipeline Project v. Missouri*, 484 U.S. 495 (1988). *See* Petition at 26.

The petition makes no attempt to find a conflict among circuit court decisions. Indeed, there is none. No circuit other than the Eighth has addressed the setting of priorities under the Flood Control Act. Nor has any other circuit addressed the significance or meaning of the Master Manual.

Indeed, no other court is likely to address either question. Missouri and the Dakotas have, and will likely continue to have, their differences. But Missouri and the Dakotas are within the Eighth Circuit. Moreover, the pending multi-district litigation over the management of the Missouri River System is assigned to a district judge in the District of Minnesota. *In re Operation of the Missouri River System Litigation*, 277 F.Supp.2d 1378 (J.P.M.L. 2003). As the Judicial Panel on Multidistrict Litigation wisely recognized by consolidating Missouri River litigation in Minnesota, the Eighth Circuit is the only sensible federal appellate forum for resolving Missouri River disputes. Moreover, because it hears appeals from the district courts in all of these states, the Eighth Circuit, not another circuit, will have the opportunity to address in other, future contexts questions regarding the Flood Control Act and the Master Manual.

In the event that some other circuit eventually takes up the management of the Missouri River and disagrees with the Eighth Circuit, then the Dakotas or another party may seek a writ of certiorari. But until that time, this Court need not take up Missouri River

management questions merely because the River crosses state and circuit lines.

2. The court of appeals held that the Corps' operation of the Missouri River System is subject to judicial review and that the Master Manual is a rule that binds the Corps in managing the waters of the Missouri River. App. 21. In their petition, the Dakotas do not challenge this holding. Instead, they myopically focus on one aspect of the court of appeals opinion.

The Dakotas say that the court of appeals' "critical conclusion" was its determination "that the 1944 Flood Control Act obligates the Corps to give priority to flood control and navigation." Petition at 25. Even if this conclusion was set aside, however, the result would not change. The Master Manual – which favors navigation and flood control over recreation – would still be a binding rule constraining the Corps' discretion. The court of appeals concluded that "the Corps' decision to adopt this prioritization [in the Master Manual] was not impermissible." App. 32.

Still assuming that Congress did not assign relative priorities among conflicting uses in the Flood Control Act, the Dakotas point to nothing that suggests the court of appeals was wrong in leaving the balancing of competing interests to the Corps. To use the language of the Dakotas' petition, the Corps was assigned to manage reservoirs "as multi-purpose facilities, serving a number of interests, and with flexibility that adjusts to the basin's changing circumstances." Petition at 14. The Corps was to do so using its own judgment and expertise, for even in the

Dakotas' view, the Act itself is "silent about priorities." Petition at 21.

The State of Missouri does not concede, of course, that the Dakotas are right, and all uses of the River must be treated equally. Besides being impractical or impossible, that approach ignores the overall structure of the Flood Control Act.[3] The Act gave the Corps power over projects the dominant functions of which were flood control and navigation. Projects for which the dominant functions would be irrigation or power production would be built and operated by the Department of Interior. On this point, both Interior and the Corps were in complete agreement. See *ETSI Pipeline*, 484 U.S. at 512, n. 6-7. Of course, both Lake Oahe (as noted by the Court in *ETSI Pipeline*) and Lake Sakakawea are controlled by the Corps – not Interior. Consequently, it is obvious that the "dominant functions" of those projects – along with Fort Peck, Fort Randall, Big Bend, and Gavins Point Dams – are flood control and navigation. That is confirmed by the declaration of policy of the 1944 Act, where Congress explained why it was authorizing the building of these dams:

> In connection with the exercise of jurisdiction over the rivers of the Nation through the construction of works of

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[3]There is no resort to legislative history, the principle crutch on which the Dakotas lean, when the statutory language is clear as in this instance. *See Blum v. Stenson*, 456 U.S. 886, 896 (1984).

> improvement, for navigation or flood control, as herein authorized . . . .

33 U.S.C. § 701-1 (1944)(emphasis added).

The Dakotas' desperation is so great that they note that Congress expressly assigned responsibility to the Corps, then accuse the court of appeals of "entrusting the Missouri River Basin's cultural, political, social and economic development to the military." Petition at 15. That is a rhetorical mischaracterization of the court of appeals' opinion. First, the court's interpretation of the Flood Control Act has nothing to do with the cultural, political, or social development of the basin. It has to do with the words Congress used to describe the way water was to be managed in the reservoir system. Second, the court did not "entrust" anything to "the military." Congress had long ago made that assignment. Indeed, the court of appeals construed that assignment narrowly: it held that the Corps' actions were subject to judicial review rather than committed to agency discretion by law, as the Corps argued. Moreover, the Corps is devoted primarily to civil works and is expressly controlled by appointed civilians rather than commissioned officers. It is not as if the Court of Appeals declared martial law when it decided this mundane question of statutory construction.

The Dakotas' real complaint – since they are seeking to protect a recreation industry based on a fish introduced only after the reservoirs were completed – must be that the Corps does not manage the reservoirs to meet what they perceive to be the contemporary

needs of the basin.[4] If that is a valid criticism (and the State of Missouri does not suggest that it is), it is a criticism to be taken into account by the Corps as it prepares a new Master Manual – *i.e.*, as it reconsiders the manner in which it should balance the competing interests served by the Flood Control Act.

The Courts cannot resolve the contemporary political contest between recreation and navigation – a contest that is being fought in Congress.[5] What the court of appeals decided was a question of law. The court of appeals could decide the case without further factual development because the critical facts – those regarding the content and issuance of the Master Manual – were undisputed.

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[4]With their "contemporary needs" argument, the Dakotas beg for judicial activism of the highest order. Unsatisfied by the law Congress enacted, or the execution of it by the agency, they instead expect this Court to determine the basin's "contemporary needs" and rewrite the law to fit them. If the "contemporary needs" of the basin have changed so as to change the requirements that should be imposed on the Corps, Congress will tell us. It has not.

[5]*See, e.g.*, Missouri Senator Kit Bond Statement on USFWS Missouri River Decision, http://bond.senate.gov/press_sec-tion/record.cfm?id=216842 (viewed Jan. 28, 2004), and North Dakota Senator Byron Dorgan Says Politics Prevail Over Science In Revised 'Opinion' On Missouri River Management, http://www.senate.gov/~dorgan/newsroom/record.cfm?id216763 (viewed Jan. 28, 2004).

Were it appropriate to reach the facts, Missouri would dispute the Dakotas' assertions about the relative value of recreation and navigation, or the specific dollar values speculatively assigned to these interests, particularly insofar as they rely on documents that are not part of the record below.[6] But the procedural posture of this case is such that the factual development of the epic struggle between good and evil described by the Dakotas is not yet ripe. The United States appealed each preliminary injunction promptly, without the kind of factual development necessary to decide such a fact-intensive and opinion-laden inquiry. The court of appeals decided the case without the benefit of even a single motion for summary judgment or the record that would normally be associated with material factual disputes.

As the court of appeals held, the Corps is authorized to balance the equities through the Annual Operating Plan process, so long as it follows the Master Manual and the Flood Control Act when it does so. The Corps can promulgate a new manual. Congress can amend the Flood Control Act. But in the interim, the Corps must abide by the Master Manual and the existing Act. Again, that holding is a routine appli-

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[6]For example, petitioners cite to an article by a well-known opponent of navigation, Dr. Phillip Baumel. The Baumel and Van Der Kamp piece was not published until July 2003, well after the court of appeals issued its opinion. Petition at 7 and 25. The Dakotas appear to rely on the text for extra-record factual development. This further demonstrates that the record below is not adequately developed to allocate the River's waters as explained *supra*.

cation of administrative law that does not merit review by this Court.

CONCLUSION

For the foregoing reasons, the Court should deny the writ.

Respectfully submitted,

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In The Supreme Court of the United States

STATE OF NORTH DAKOTA AND
STATE OF SOUTH DAKOTA,

Petitioners,

v.

LT. COL. K.F. UBBELOHDE, DIST. ENGINEER, OMAHA DIST., U.S. ARMY CORPS OF ENGINEERS; GEN. D.A. FASTABEND, COMMANDER, NW DIV., PORTLAND, OR., U.S. ARMY CORPS OF ENGINEERS; STATE OF MISSOURI; AND THE STATE OF NEBRASKA; ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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REPLY BRIEF FOR PETITIONERS

The States of Missouri and Nebraska, the MO-ARK Association, and the U.S. Corps of Engineers oppose the Petition on numerous grounds. Before responding, the Dakotas restate the issue on which review is sought. To the great detriment of the Dakotas, the Eighth Circuit misinterpreted the 1944 Flood Control Act. Pub. L. No. 78-534, 58 Stat. 887 (1944). The court of appeals stated that while the Act requires that the Missouri River is to be managed for several purposes, two of these purposes, flood control and navigation, have preeminence. Pet. App. at 5, 21, 32. The Dakotas agree that flood control is the Act's primary purpose, but disagree that navigation takes precedence over other uses. More particularly, the court erred in concluding that the Act gives navigation priority over recreation. This error of law requires review.

I. The Question Presented accurately reflects the ruling by the court of appeals.

a. The Corps' argument. The Corps states that the Petition is flawed because North and South Dakota misunderstand the court's ruling. Corps Brf. at 13-15. In the Corps' view, the court did not construe the 1944 Flood Control Act to give navigation a priority. On the contrary, the Corps states, the court ruled that project purposes have parity. *Id.* at 17. Such a fundamental disagreement about the court's ruling makes it necessary to quote the court's statements about the Act.

> The Act . . . laid out certain substantive interests that it was to serve. The *dominant functions* of the Flood Control Act were to avoid flooding and to maintain downstream navigation. . . . At the same time, however, the Act recognizes *secondary uses* of the River including irrigation, recreation, fish, and wildlife.

Pet. App. at 5 (emphasis added; citations omitted). The court states that, under the Act, navigation is a "dominant

function" and recreation is a "secondary use." This is an expression of priorities, and even if it is implied it is nonetheless clear. Consequently, the Corps' argument that the "decision does not establish priorities" is at best strained. Corps Brf. at 13. The court of appeals also stated:

> The Flood Control Act clearly gives a good deal of discretion to the Corps in the management of the River. But this discretion is not unconstrained; the Act lays out purposes that the Corps is to consider in managing the River. The Act recognizes what the Supreme Court has called the *dominant functions* of the River's reservoir system – flood control and navigation . . . While flood control and navigation are *dominant functions*, the Act also recognizes recreation and other interests [as] *secondary uses* that should be provided for. . . . The text of the . . . Act thus sets up a balance between flood control, navigation, recreation, and other interests.

Pet. App. at 21 (emphasis added; citations omitted). The court again labeled navigation "dominant" and recreation "secondary." While the court added that the Act requires the Corps to "balance" all interests, this is small comfort when some interests are "dominant" and others "secondary." The resulting "balance" will, as it has in the past, favor navigation. The court's third statement about the Act settles any doubt about its ruling.

> North Dakota argues that the Flood Control Act itself precludes the Corps from favoring navigation over recreation. This argument is simply incorrect; the . . . *Act does not require the Corps to give equal treatment to recreation.* The . . . Act provides little guidance about what priority the Corps can or must give to different interests. The evidence that we do have, including the sequential listing of interests that uniformly lists navigation before recreation, indicates that the Corps's *primary concerns* should be flood control and navigation.

Pet. App. at 32 (emphasis added). The court here expressly rejects the idea that the Act gives parity to recreation and navigation. It found such an idea "simply incorrect."

The Corps is alone in its curious view of the decision. Nebraska, for example, believes that the court did give navigation a priority. According to Nebraska, the court "rejected the Dakotas' basic premise, that the [Act] requires the Corps to 'equitably balance the uses to which the river is put.'" Neb. Brf. at 17. *See also* MO-ARK Brf. at 13; Mont. Amicus Brf. at 2-3. Similarly, the Nebraska District Court believes that the Eighth Circuit decision gives navigation a priority.

> The Eighth Circuit . . . stated that one of the Corps' primary interests is maintaining navigation flows . . . and . . . acknowledged that the maintenance of minimal navigable flows trumps other important interests, including the protection of wildlife.

Mem. & Ord. on Motion to Amend Preliminary Injunction at 2, *Nebraska v. Ubbelohde*, No 8:02CV217 (D. Neb. July 23, 2003).

The Corps' position actually supports certiorari. The Corps is responsible for implementing the 1944 Act and has a substantial interest in its proper interpretation. The court of appeals ruled that the Act gives navigation a priority. The Corps believes that such an interpretation is wrong. *E.g.,* Corps Brf. at 17. *See also* Pet. at 21-24. Thus, the Corps *agrees* with the Dakotas that the Act does not give navigation a priority. If the Corps properly understood the court's ruling it would seem compelled to support the Petition to ensure that its governing statute is properly construed.

b. The MO-ARK and Nebraska arguments. MO-ARK and Nebraska state that the Question Presented was not addressed by the court of appeals. MO-ARK Brf. at 7-8, 10-11; Neb. Brf. at 15-17. The Question Presented concerns whether the Act favors navigation over recreation. Pet. at 6-9. The court explicitly addressed this issue,

Pet. App. at 5, 21, 32, and its ruling on navigation's priority was not dicta. The court's understanding of the Act led directly to overturning the North Dakota and South Dakota injunctions. As such, the Petition does not, in Nebraska's words, "improperly aggrandize the issue decided." Neb. Brf. at 15. Nor does the Petition "dramatically misstate the issue presented and ruled on below." *Id.* at 1. In further response to Nebraska's argument that the Question Presented was not addressed by the court, the Dakotas quote from a motion Nebraska filed with the Eighth Circuit:

> The interpretation of the Flood Control Act of 1944 is also before this Court. It was squarely raised by the Corps in the appellant's brief filed in . . . Cause No. 02-2191, and also raised by the Corps in its appellees' briefs in . . . Cause Nos. 02-2187 and 02-2305. It has been briefed by all of the party States, including North Dakota, South Dakota, Nebraska, and Missouri, as part of these consolidated appeals.

Nebraska's Motion to Enlarge Appellate Stay at 15, *Nebraska v. Ubbelohde*, No. 02-2191 (8th Cir. May 23, 2003).

Nebraska also describes the court of appeals decision as a "straightforward" agency review case unworthy of certiorari. Neb. Brf. at 16. *See also* MO-ARK Brf. at 7. Because the underlying actions raise an APA claim hardly warrants rejecting certiorari. It is not uncommon for the Court to review APA cases. *E.g.*, *Alaska Dep't of Envt'l Conservation v. E.P.A.*, 124 S.Ct. 983 (2004); *Dickinson v. Zurko*, 527 U.S. 150 (1999).

Nebraska and MO-ARK point out that the court of appeals, besides ruling on the 1944 Act, also ruled that the Corps' decisions are subject to judicial review and that South Dakota's judicial estoppel theory lacked merit. Neb. Brf. at 15; MO-ARK Brf. at 7-8. The Dakotas do not seek review of the court's ruling on these issues, which are irrelevant in deciding whether the court's interpretation of the Act merits review.

II. The Question Presented is not an interlocutory matter better decided another day.

The Corps argues that North Dakota's suit and South Dakota's suit, which were brought in 2002 to protect the 2002 smelt spawn, are yet to be decided on their merits and that when they are, the states should then seek to place their concerns about the Flood Control Act before this Court. Corps Brf. at 16. This argument is inconsistent with the Corps' current litigation position in the underlying actions, which it seeks to dismiss on jurisdictional grounds. In a pending motion before the District Court, the Corps asserts that the suits no longer present a case or controversy. Federal Defendants' Motion for Summary Judgment on Existing Factual Circumstances, *In re Operation of the Missouri River System Litigation,* No. 03-MD-1555 (D. Minn. Dec. 15, 2003).

> Many of the claims currently before this [District] Court are now moot because they challenge agency actions that have now expired and are wholly in the past. . . . Similarly, several Plaintiffs have challenged elements of the Corps' Missouri River operations for 2002 . . . The challenged elements of the Corps' operations, however, are now over.
>
> Even if Plaintiffs satisfied the requirements of standing when these challenges were filed . . . they cannot do so any longer. These past agency actions cannot injure Plaintiffs now. Because Plaintiffs cannot show the 'requisite personal interest' to maintain these claims, the claims are now moot and the Court has been deprived of jurisdiction over them.

Id. at 9.

If the Corps has its way, there will not be a decision on the merits. There will not be any further discussion by any court of the Flood Control Act's proper meaning. The Question Presented will either be considered by this Court now or, if the Corps has its way, not at all. Further, in light

of the Eighth Circuit's decision, North and South Dakota believe that their 2002 suits, which challenged the Corps' decision to prefer navigation to recreation, have little life left if this Court denies review. No further proceedings are needed to make the Question Presented ripe for review by this Court.

III. The Question Presented does not ask that the Court resolve fact questions, interfere with an on-going administrative process, or second-guess Congressional policy.

MO-ARK asserts that if the Court issues a writ it will have to address factual disputes. MO-ARK Brf. at 9. This is not so. It is the court of appeals' misreading of the 1944 Flood Control Act that warrants review. This is a question of law.

MO-ARK and the Corps argue that since the Corps is revising its 1979 Master Manual the Court should not become involved because a new Manual may resolve the dispute. Corps Brf. at 17; MO-ARK Brf. at 11. A new Master Manual is to be issued March 19, 2004. Corps Brf. at 12-13. It is likely to be challenged by numerous parties and when it will take effect is uncertain. More importantly, the Question Presented does not ask the Court to review either the Manual or what the court of appeals said about it. Rather, the issue that merits certiorari, the sole issue on which the Dakotas seek review, is the proper interpretation of the governing document, the 1944 Act.

The Corps also states that one of our "basic claims" is that the Manual unfairly considers recreation interests. Corps Brf. at 17. This is misleading. The Question Presented has nothing to do with the Manual. The Petition is confined to the Flood Control Act. Consequently, whatever the Corps may do about revising the Manual is irrelevant to deciding whether certiorari is warranted.

Nebraska argues that the Act is clear and that the Dakotas want it re-written. Neb. Brf. at 25-26. *See also*

Miss. Brf. at 9-10. The Act approved the Pick Plan and the Sloan Plan "as revised and coordinated" by the Joint Report. Pet. App. at 90. The Joint Report states that the basin is to be developed to "secure the maximum benefits for flood control, irrigation, navigation, power, domestic and sanitary purposes, wildlife, and recreation." *Id.* at 102. There is no list of priorities here. Congress expressly included recreation and wildlife as purposes for which the river is to be managed and did not assign these interests a priority lower than navigation. The Dakotas are not asking the Court to re-write the Act, but seek its proper interpretation.

IV. The Question Presented seeks resolution only of the disparate treatment given recreation and navigation. It does not implicate other downstream uses and does not seek day-to-day judicial oversight of the Corps' operations.

Nebraska and MO-ARK discuss such downstream interests as flood control and water needs for irrigation, drinking water, and power plants. MO-ARK Brf. at 3-4; Neb. Brf. at 4-7. This obscures the issue. Firstly, the Petition does not question operating the system for flood control. Flood control has priority. Secondly, the only relationship the court of appeals ruled on was the one between recreation and navigation. The relationship between recreation and other downstream interests wasn't considered. The Petition seeks review solely of the court's holding that the Flood Control Act prefers navigation to recreation. Further, any implication that the flows needed for navigation are the flows needed for other downstream interests is untrue and unsupported. MO-ARK Brf. at 3-4, 17; Neb. Brf. at 5-6. The upstream-downstream dispute arises because of the extravagant water demands made by downstream shipping. Navigation is a water hog. The level of flows needed to support the barge industry exceeds those needed for power generation, irrigation, and drinking water. These uses can be protected with far less water

than the barges require. For example, the Corps' 2001-2002 Annual Operating Plan states that Gavins Point releases to support navigation generally need to be around 25,000 cfs. Consol. App. at 1575, 1578, *South Dakota v. Ubbelohde*, Nos. 02-2187, 2191, 2305 (8th Cir.). The Plan also notes that 14,000 cfs is generally "adequate to serve all downstream water intakes." *Id.* at 1578. *See also id.* at 1579. The 1979 Master Manual also expresses the disparities in streamflow requirements between navigation and other downstream interests. *E.g.*, *id.* at 1396-1401. MO-ARK and Nebraska unfairly seek to couple the moribund navigation industry to more practical and justifiable uses.

Further, neither North Dakota nor South Dakota seek a preference for recreation over such downstream uses as drinking water and power generation. Nebraska mischaracterizes our position when it states that "the Petition is about maximizing the Dakotas' interests at the expense of established downstream uses . . . " Neb. Brf. at 26. Nebraska goes even further astray by stating that the Dakotas want recreation promoted "to the exclusion of flood control, navigation, power generation or water supply" *Id.* at 21-22. The Dakotas' claim and Petition are hardly so extreme. We ask only that the Court review the ruling that the Flood Control Act mandates that the Corps prefer navigation over recreation. If the Court agrees that there is no such mandate it does not follow that the system will be operated to favor recreation over flood control, irrigation, drinking water systems, and power production. It would, however, follow that the Corps could no longer push recreation to the back of the line. Recreation would be entitled to greater consideration in the Corps' balancing efforts, but drinking water and electricity for St. Louis, Omaha, and other downstream cities would not be shut off.

MO-ARK presents a different specter. It asserts that the Dakotas seek, or that our position will lead to day-to-day judicial review of the Corps' operations. MO-ARK Brf. at 9. This is hardly a consequence of giving recreation parity. The Corps will retain discretion in managing the river.

V. The Question Presented does not seek review of the 1979 Master Manual.

MO-ARK and Missouri argue that the 1979 Master Manual supports the court's decision to give navigation a preference. MO-ARK Brf. at 14-15; Miss. Brf. at 5, 7. On March 19, 2004, a new Master Manual is to replace the 1979 Manual. Corps Brf. at 12-13. More importantly, the Petition seeks only the Court's interpretation of the Flood Control Act, not its view of the soon to be replaced 1979 Manual. Nebraska adds that we are making an untimely challenge to the 1979 Master Manual. Neb. Brf. at 3, 24. Again, the Dakotas do not challenge the 1979 Manual, or whatever use the court below might have made of it.

VI. The Court of Appeals made errors of law.

MO-ARK argues that the court of appeals properly found that *ETSI Pipeline Project v. Missouri,* 484 U.S. 495 (1988), ruled that navigation has priority under the Flood Control Act. MO-ARK Brf. at 13. *ETSI's* role in this dispute is discussed in the Petition. Pet. at 26-27. In sum, *ETSI* was an inter-agency dispute that did not even involve what priorities may have been set, if any, by the Flood Control Act. The court's reliance on it was misplaced. MO-ARK adds that the Dakotas improperly rely on the O'Mahoney-Milliken Amendment to further the recreation claim. MO-ARK Brf. at 15-16. The Dakotas don't rely on the Amendment.

Nebraska and MO-ARK argue that the Flood Control Act gives navigation priority. Neb. Brf. at 17-24; MO-ARK Brf. at 13-14, 16-17. While the Petition contains an adequate discussion of the Act, Pet. at 15-24, the Dakotas make one point. The Joint Report, authored by the Bureau of Reclamation and Corps of Engineers, was adopted by Congress as a part of the Flood Control Act. Pet. App. at 90. The Report, and thus the Act, states that the Missouri River Basin is to be developed to "secure the maximum benefits for flood control, irrigation, navigation, power,

domestic and sanitary purposes, wildlife, and recreation." *Id.* at 102. Recreation is as much a project purpose as is navigation. The Joint Report adopted by Congress does not award navigation a priority.

CONCLUSION

For the foregoing reasons and those in the Petition, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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MARCH 2004

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No. 03-935

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In The
Supreme Court of the United States

STATE OF NORTH DAKOTA AND
STATE OF SOUTH DAKOTA,

Petitioners,

v.

LT. COL. K.F. UBBELOHDE, DIST. ENGINEER, OMAHA DIST., US ARMY CORPS OF ENGINEERS, BRIG. GEN. W.T. GRISOLI, COMMANDER, NW DIV., PORTLAND, OR. US ARMY CORPS OF ENGINEERS; STATE OF MISSOURI AND THE STATE OF NEBRASKA; ET AL.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

STATE OF MONTANA AMICUS BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the 1944 Flood Control Act allows the Corps of Engineers to consistently allocate the water from the Missouri River's upper basin reservoirs to serve downstream navigation at the expense of upstream fish, wildlife and recreation?

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STATE OF MONTANA AMICUS BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The State of Montana supports Petitioners, State of North Dakota and State of South Dakota and urges the Court to accept the Petition for Certiorari in order to determine whether the 1944 Flood Control Act, 16 U.S.C. 460d, allows the United States Army Corps of Engineers to consistently allocate the water from the Missouri River's upper basin reservoirs to serve downstream navigation at the expense of upstream fish, wildlife and recreation.

INTEREST OF AMICUS CURIAE

Attorney General Mike McGrath is the chief legal officer of the State of Montana and one of five members of the State Land Board, which governs the use of 5.2 million acres of state-owned land. In his official capacity, the Attorney General has significant responsibility for management of trust resources within Montana and for protecting Montana's resources in the interest of the citizens of the state. With approximately 250,000 acres of water in Fort Peck Reservoir and over 400 miles of the Missouri River within the state, Montana has one of the largest river reaches affected by the operation of the Missouri River System and the mainstem reservoirs. This is a significant public resource for the people of Montana, and under Montana law, the Attorney General has the common-law authority to appear in all actions affecting the public interest. *State ex rel. Olsen v. Public Serv. Comm'n*, 129 Mont. 101, 115, 283 P. 2d 602, 604 (1955).

The Flood Control Act of 1944 vests the United States' power with the federal government's Engineering Corps, to make far-reaching allotments of water in the arid west. The ensuing management decisions exercised by the Corps reach into the very heart of state resource management, meriting strict adherence to equal consideration for all uses of the river. Management decisions of a river system that crosses seven states and traverses a 523,900 square mile area should not be determined lightly, nor without consideration of competing interests and needs, nor in an arbitrary manner. According to a Montana Department of Natural Resources and Conservation water resources study, the average stream flow contribution to the Missouri River from Montana is 7,774,000 acre-feet per year. When combined with the flow from Montana's Yellowstone River and other tributaries, the state's contribution to the Missouri River is about 8,804,000 acre-feet per year. This flow represents 76 percent of the average stream flow at Sioux City, Iowa, and 30 percent of the stream flow at the mouth of the Missouri River where it joins the Mississippi. The magnitude of the volume of water alone gives Montana an abiding interest in this vital resource and merits review of the decision below. In addition, the *Summary of Actual 2000-2001 Operations*, February 2002, App. 3 identifies a significant recreational interest in Montana's Fort Peck Reservoir, including "5,250,300 visitor hours in 1999 and increasing to 6,206,440 visitor hours in 2001." *Id.*, Table XIII, p. 48. Montana holds a primary interest in the management of the river system for its recreational values, its fish and wildlife and the critical habitat the river system provides and a further interest in the concomitant economic value of a viable recreational use of Fort Peck Reservoir. The decision below holds that the Corps must apply an analysis that gives a priority to

navigation, a dying industry on the Missouri, as a dominant function of the river. The holding restricts consideration of fish, wildlife and recreation to a secondary sequential consideration of uses. Such an application is wholly inconsistent with the 1944 Flood Control Act and will continue to compromise Montana and other upstream states' primary interest in the river, placing critical river and reservoir habitat at risk.

In Montana, the United States Army Corps of Engineers operates the mainstem Missouri River reservoir at Fort Peck, and the State of Montana manages the wildlife and fisheries and their critical habitat at the reservoir. In its sovereign capacity, the State of Montana has previously brought actions on its behalf and on behalf of all of its citizens and visitors, participating in related cases in United States District Court challenging the operation of the Missouri River under the 1944 Flood Control Act for more than a decade. *State of Montana v. Kurt Ubbelohde, et al.* (Civ. No. 02-70-Blg-RFC) (D. Mont. filed May 13, 2002)); *State of South Dakota, et al. v. Needham, [later Bornhoft], et al.* (Civ. No. 91-26 Blg.) (D. Mont. filed Feb. 4, 1991). The Petitioner also accurately notes that, although not a party to this action, Montana's Department of Fish, Wildlife & Parks is currently a party to on-going litigation involving the Missouri River's proper management. *Blaske Marine, Inc., et al. v. Hon. Gale Norton, et al.* (Civ. No. 8.03-CV –142 filed April 15, 2003).

Montana maintains a current and vital interest in the resolution of the management of the Missouri River system. The State of Montana supports North Dakota and South Dakota's petition for writ of certiorari because Montana is similarly situated upstream on the Missouri River system and suffers similar harm when the United

States Army Corps of Engineers manages the reservoirs in a manner that conflicts directly with Montana's primary interest in the use of the water for recreation, fish and wildlife, along with the critical habitat to support those uses. The fish and wildlife resources along the Upper Missouri River reservoir at Fort Peck have led to the development of a valuable recreational industry, yet the reservoir and the waters within rely upon appropriate operation of the reservoir by the United States Army Corps of Engineers. The Army Corps of Engineers yearly sets out a plan for the operation of the reservoirs in Montana, North Dakota and South Dakota in its Annual Operating Plan based upon the Flood Control Act. While the Annual Operating Plan draft is submitted to the upstream states for comment, the plan is implemented at the discretion of the Corps of Engineers, under the auspices of its Master Manual. Both management documents rely upon an archaic and, on occasion, erroneous interpretation of the Flood Control Act of 1944, one that has been further analyzed in a manner inconsistent with the Act by the Court below. For these reasons, the State of Montana has a vital interest in an accurate interpretation and application of the Flood Control Act of 1944, and respectfully submits its support of North Dakota and South Dakota's Petition for Writ of Certiorari.

BACKGROUND

At times, the Corps of Engineers has released water from Fort Peck Reservoir in Montana to make up water for the river system that it cannot for one reason or another release from Lake Sakakawea in North Dakota, from Oahe Reservoir in North and South Dakota, or from Lake

Francis Case Reservoir in South Dakota. These activities are inconsistent with the Flood Control Act and have put the survival of Montana's fish and wildlife resources, along with its recreational interests in the reservoir, in peril. *Temporary Restraining Order, State of Montana v. Ubbelohde, et al.*, CV-02-70 Blg-RFC (D. Mont. filed May 13, 2002). The Corps' management of the Missouri River System during the recent past years of drought in the upstream states has consistently misallocated the waters in the upstream reservoirs, placing the fish and wildlife, along with the recreation they provide, at risk. During periods of low water, the Corps will regularly short-change the fish and wildlife species in the upstream states in favor of downstream navigation, resulting in a decimation of critical habitat for which the State of Montana has management authority and trust responsibility. In the current case, the Court below misapplied the Flood Control Act of 1944 which results in the United States Army Corps of Engineers managing of the Missouri River mainstem reservoirs in a manner that pits one state's reservoir management against other states and allows downstream navigation to reign supreme over upstream recreational, fish and wildlife uses. The error of the Corps' continued operation of the river based upon the interpretation of the Act by the Court below is capable of repeating itself in hundreds of ways for decades to come if not reviewed. For all these reasons, the State of Montana, through its Attorney General, argues in support of North Dakota and South Dakota's petition.

The upper basin states took action more than a decade ago regarding the Corps of Engineers' operation of the upstream mainstem reservoirs. In a suit filed by South Dakota, North Dakota and Montana in United States

District Court in the District of Montana, the three states sought relief from a similar misapplication of the Flood Control Act by the Corps of Engineers that had categorized recreation and fish and wildlife as "secondary purposes." *State of South Dakota, et al. v. Needham [later Bornhoft]* Civ. 91-26-Blg. (D. Mont. filed Feb. 4, 1991.) In that action the states alleged that the United States had improperly assigned downstream uses of Missouri Reservoir waters higher priority than recreation, fish and wildlife uses as a result of an erroneous interpretation and subsequent setting of priorities which the Corps of Engineers sets forth in interpreting the Flood Control Act. The Corps then implemented those erroneous priorities through its Annual Operating Plan under the auspices of its Master Manual. Although Judge Shanstrom dismissed the 1991 matter without prejudice, he did so after concluding, "the Corps has agreed to give all water uses **equal consideration** while the Master Manual review is undergoing a revision" and the court further stated that "plaintiffs have obtained an acknowledgement by defendants that all current Missouri River water uses will receive **equal consideration** during review of the Master Manual. Moreover, there is a reasonable expectation that the Corps' revised plan will reflect contemporary uses and needs of the Missouri River Basin." *Bornhoft* Order at 3, App. 1. (Emphasis added.) The United States obtained dismissal of the three states' action with representations that "all uses are to receive **equal consideration**." *Id.* at 4. (Emphasis added.) The following year heavy rains came and filled Fort Peck, Lake Sakakawea and Oahe Reservoirs. The drought and ensuing management conflicts were put off for another decade.

With yet another series of drought years hard upon the upper basin states, the management conflict is unresolved, and the promised Master Manual revisions, although now released in draft form, have not been completed after almost 15 years of review. Despite those long-ago assurances that the Corps would consider all uses equally, an assurance confirmed by the District Court's Order in 1993, the Corps in this current dispute again disregarded the very analysis it assured. The Corps failed to give all uses equal consideration in its operation in 2002, which again led to sequential litigation upstream as reservoirs were drawn down. The Eighth Circuit Court's decision further misapplies the necessary analysis of equal uses that the Corps must undertake pursuant to the 1944 Flood Control Act.

ARGUMENT

I. THE HOLDING BELOW PERMITS THE CORPS OF ENGINEERS TO OPERATE THE MISSOURI RIVER RESERVOIR SYSTEM IN A MANNER THAT PREVENTS THE UPSTREAM STATES FROM PROTECTING THEIR PRIMARY INTEREST IN THE RIVER FOR RECREATION, FISH, WILDLIFE AND THE CRITICAL HABITAT NECESSARY TO SUSTAIN THE FISH AND WILDLIFE SPECIES.

The Corps' decisions to increase releases from Fort Peck Reservoir in Montana, Lakes Sakakawea and Oahe in North Dakota and Lakes Oahe and Francis Case in South Dakota during the continuing drought with all its attendant harm is an abuse of its management discretion, is inconsistent with the Flood Control Act, and the Eighth

Circuit decision upholding those actions should be reviewed. The Court below ruled correctly that the Corps actions are subject to judicial review as its "discretion is not unconstrained." Petitioners' App. at 21. However, under an "arbitrary and capricious standard" set forth in 5 U.S.C. § 706, where no preference is given in the Act, nor in the legislative history, nor is it abided in the Corps' representations of equal use analysis, the Corps' management discretion was abused. *See, e.g., Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 376-378 (1989); *Oahe Conservancy Subdistrict v. Alexander*, 493 F. Supp. 1294, 1298 (D.S.D. 1980).

The reviewing court should have reviewed whether the Corps' decisions were based upon a consideration of the relevant factors under the Flood Control Act and whether there has been a clear error of judgment. *Marsh*, 490 U.S. at 402, (*quoting Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)). The reviewing court's inquiry should have been searching and careful although narrow. *Id.* However, the Court below left standing an arbitrary draw down of water from the upstream reservoirs that was contrary to the equal uses analysis that the Corps should have applied. The failure of the Corps to consider equally the relevant uses of the river system, both for downstream navigation and upstream recreation, fish and wildlife, clearly demonstrates that the Corps did not make a reasoned evaluation of all the factors under the Act. As a result, Petitioners correctly urge review.

There has been a history of analysis of the priority of uses that the Corps has applied in operating the reservoirs and it has been found wanting. The United States General Accounting Office in 1992 found that the Corps of Engineers was flatly incorrect in its view that recreation, fish

and wildlife are secondary purposes. The General Accounting Office concluded that it could find "no appropriate basis" for the Corps of Engineers' view that recreation was a secondary purpose that "receives water that is left over after other uses are satisfied." General Accounting Office, *Water Resources: Corps' Management of the Ongoing Drought in the Missouri River Basin*, No. 92-4 (Jan. 1992), at 5 (App.2.) The General Accounting Office also rejected the Corps' view that recreation could or would not be given priority over other uses "even if their analysis showed that the change in priority could increase total system benefits. . . ." *Id.* at 4-5.

It should be noted with certainty that the Court below has wrongly applied a priority analysis to the Master Manual. Thus, the Corps will remain committed to operating the mainstem Missouri dams, including Fort Peck Dam, Garrison Dam, Oahe Dam and Fort Randall Dam on the basis of misapplied priorities assigned to uses of water that are inconsistent with the Flood Control Act of 1944. Under the analysis of the Court below, the Corps continues to misread the Act and fails to evaluate all the factors as demanded by the Flood Control Act. Where the Court below has determined that the Master Manual is binding on the Corps, the Corps' erroneous management decisions will continue to gravely harm the recreational, fish, wildlife and critical habitat for species in the upstream reservoirs unless reviewed by the Court. As demonstrated to the Court below, the Corps insisted that it could not change the water release regime it envisioned for spring 2002 because to do so would be contrary to the Master Manual. Even where the Master Manual is relied upon, and particularly where it is binding on the agency as determined by the Eighth Circuit Court below, the Corps

should be free to manage the river system with respect and consideration of all uses of the water equally as the Act requires. *Master Manual* § 9.3, The Master Manual's fifth priority for recreation, fish, and wildlife states, "[i]nsofar as possible without serious interference with the foregoing functions, the reservoirs will be operated for maximum benefit to recreation, fish and wildlife." *Master Manual* § 9.3. Under the very terms of the priorities set out in the Manual, when there will be no "serious interference" with navigation, the reservoirs are to be operated for the maximum benefit to the upstream uses. If the terms of this section of the Master Manual interpreting the Flood Control Act are to be given content, upstream interests in recreation, fish and wildlife must be preferred over navigation so long as doing so does not cause "serious interference" with downstream navigation. In the context of the case where irreparable harm will result to Montana's spawning fish species or to North Dakota's cold water fishery or to South Dakota's recreational fishery, the Corps must balance navigation and upstream recreation, and determine what, if any, effects on navigation exist when managing for critical habitat for fisheries and recreation. If no serious interference is determined, the Corps should prefer recreation. The record is devoid of any determination made by the Corps that upstream fisheries, habitat and recreation interfere in any serious manner with downstream navigation.

By its claimed reliance on the Master Manual, but without consideration of the actual relevant factors under the Flood Control Act, the Corps will consistently fail to make a reasoned decision with equal consideration to all uses of the river. This is particularly true where, as here, the Court below misapprehended the sequential priorities

test under the Flood Control Act, yet held that the Master Manual is binding and must be followed.

II. THE EIGHTH CIRCUIT COURT'S OPINION IS INCONSISTENT WITH THE 1944 FLOOD CONTROL ACT IN CONCLUDING THAT THE CORPS OF ENGINEERS' MANAGEMENT OF WATER FROM THE UPSTREAM RESERVOIRS WAS PROPER UNDER A SEQUENTIAL CONSIDERATION OF USES TEST.

The Court below largely ignored what Petitioners appropriately argue: that the preamble to the 1944 Flood Control Act is instructive for the balancing of the various services the river system provides. Navigation under the act is to be limited to that which provides "a substantial benefit" and is "operated consistently with appropriate and economic use of the waters . . . by others." Petition at 16. North Dakota and South Dakota further argue that navigation does not meet that limitation because it does not provide a substantial benefit to the basin according to the Revised Draft Environmental Impact Statement. In fact, on balance upstream uses for fish, wildlife and recreation produce a great economic benefit when compared to a marginal navigation industry. Petition, App. at 83. Montana strongly urges that interpretation and further argues that the Corps of Engineers recognized and confirmed that interpretation in response to the earlier litigation. (*Bornhoft* Order at 3, App. 1.) Furthermore, the United States confirmed and supported that interpretation in its 1992 General Accounting Office Water Resources Study. (*GAO Water Resources*, Jan. 1992, at 4-5; App. 2.) Even so the Corps undertook to draw down water from Montana, North Dakota and South Dakota Reservoirs in

the spring of 2002 in the midst of a major drought without regard to that interpretation, leading to the current and ongoing litigation.

In May 2002, after South Dakota and North Dakota received injunctive relief for their reservoirs, Montana was forced to seek emergency relief for its reservoir. Montana successfully sought a ten-day injunction to prevent the release of water from Montana's Fort Peck Reservoir until the critical spawning period for pike and perch had passed. *State of Montana v. Ubbelohde, U.S. District Court, District of Montana*, CV-02-70-Blg. In that 2002 litigation, each upstream state was required to seek emergency injunctive relief in order to prevent the Corps from managing the reservoirs contrary to the needs of the fish, wildlife and recreation. While Montana's critical spawning period was accomplished and our cause thereafter dismissed by stipulation, the management issue remained largely unresolved because the Corps continued to improperly assign downstream uses of Missouri Reservoir waters higher priority than recreation, fish and wildlife uses.

If the decision of the Court below is left unreviewed, the Corps of Engineers will continue to apply a standard contrary to the Flood Control Act of 1944, especially in critical recurrent drought years, in contradiction to the Corps' own interpretation that "'[t]here is no statement in the Act . . . that navigation is always entitled to a priority over the needs of fish and wildlife.'" Petition at 21 (*quoting* Consolidated Reply Br. of Fed. Defendants-Appellants at 10). Indeed, even the legislative history of the Act is silent as to any priority of consideration. This too was conceded before the Court below, when the Corps stated, "the purposes identified in the legislative history, are not

specifically identified as primary or secondary purposes and are not prioritized in importance by Congress." *Id.* at 1, Pet. at 21-22. The only exceptions to equal consideration of all uses under the Act is the priority given to consumptive uses of the water, subject to flood control.

In a continuing misapplication of the Act, supported by the holding of the Court below, the upstream reservoirs will be drained to record low levels, causing substantial harm to the fish, wildlife and recreation in the upstream reservoirs. Such actions place Montana's critical habitat for species at risk. In turn, this management regime has and will continue to cause substantial economic harm to the upstream states, including Montana.

CONCLUSION

The decision of the Court below is inconsistent with the 1944 Flood Control Act and fails to protect the upstream states' primary interest in the Missouri River. The State of Montana supports the Petition of North Dakota and South Dakota and urges the Court to accept certiorari.

Respectfully submitted,

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February 2004

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

STATE OF SOUTH DAKOTA; STATE OF NORTH DAKOTA; STATE OF MONTANA; et al., Plaintiffs, vs. COLONEL STEWART H. BORNHOFT, District Engineer, Omaha District United States Army Corps of Engineers, et al., Defendants.	No. CV CV-91-26 JDS-BLG MEMORANDUM AND ORDER * * * * * * * * * * * (Filed Feb. 3, 1993)

This matter is before the Court on plaintiff States' Motion to Stay Proceedings in the above-entitled cause. Plaintiff States' motion, as well as briefing by the respective parties on the issue of ripeness, originated from a telephonic status conference conducted by the Court on July 23, 1992. Upon careful consideration of the briefs submitted and arguments advanced therein, I am prepared to rule.

BACKGROUND

Plaintiff States filed this action on February 4, 1991, seeking a declaratory judgment that the United States Army Corps of Engineers ("Corps") has improperly assigned downstream uses of Missouri River reservoir waters higher priority than recreation and fish and wildlife uses "as a

result of its erroneous interpretation and the unlawfully static priorities which the Corps of Engineers sets forth in the Master Manual and annually implements in the annual operating plan . . . " *See* Complaint, para. 20.

Plaintiffs' pleadings seek this Court to order the Corps to develop a plan of operation that "reflects contemporary uses and needs of the basin."

Prior to the filing of this action, the Corps initiated a review of its Master Manual procedures pursuant to Army regulations, 33 C.F.R. 222.7. Such administrative procedure provides for the development of technical information concerning the impacts of various operating criteria. The process permits comment and review by all affected states and users of the river.

During the course of the present Master Manual review and the preparation of an Environmental Impact Statement, "all existing uses of the system will be considered in determining whether revisions to the current water control plan should be made." *See* Declaration of Duane Sveum. In fact, the Corps has asserted that, during this review process, all uses are to receive equal consideration. Plaintiffs acknowledge, as well, that the Corps of Engineers' official legal position may have changed in recent years with regard to the operation of the Missouri River mainstem dams to allow for equal consideration of recreational uses. *See* Plaintiff States' Brief In Support of Stay, pp. 8-9.

In the present motion, plaintiffs seek a stay of the above-entitled action pending completion of the Master Manual Review in order to determine whether "the Corps will adhere to its 'official' position through the completion of that review. . . . " *Id* at 18.

For the reasons advanced below, dismissal, rather than a stay of proceedings, is appropriate in this matter.

DISCUSSION

The present action is appropriate for dismissal because the issues raised in the complaint are no longer alive. The corps has agreed to a form of interim relief[1] for plaintiffs that essentially renders moot the issues in the complaint. Mootness is an element of justiciability, and, therefore, the Court has a duty to consider it sua sponte. No jurisdiction exists to hear a case in which events have occurred that prevent the Court from granting effective relief. *Canez v. Guerrero*, 707 F.2d 443, 446 (9th Cir.1983).

Plaintiffs have obtained an acknowledgement by defendants that all current Missouri River water uses will receive equal consideration during the review of the Master Manual. Moreover, there is a reasonable expectation that the Corps' revised plan will reflect contemporary uses and needs of the Missouri River Basin.[2] In light of the Corps' present position, I see no way in which this Court can provide any more effective relief if this matter is eventually decided on the merits in favor of plaintiffs. Thus, the issues before the Court are moot.

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[1] The Corps has agreed to give all water uses equal consideration while the Master Manual Review is undergoing a revision.

[2] This expectation arises from what appears to be a change in the official policy of the Corps regarding equal consideration of uses as recently articulated by John Elmore, Chief, Operations, Construction & Readiness, Headquarters U.S. Army Corps of Engineers.

Even if the matter were not moot, this Court lacks jurisdiction to rule on the merits of the case because it is not ripe for determination. The ripeness inquiry asks whether the issues are fit for judicial decision and whether the parties will suffer hardship if the court does not consider the issues. *Gates v. Deukmejian*, 977 F.2d 1300, 1317 (9th Cir.1992) (citations omitted). The issue raised by this action is not fit for judicial resolution. In light of the Corps' practice during the revision of the Master Manual and its potential change of policy, the harm to plaintiffs is hypothetical rather than direct or immediate. Moreover, the plaintiffs have failed to demonstrate that they will suffer any hardship if I wait to determine whether an actual justiciable issue arises in the future.

Accordingly,

IT IS ORDERED that plaintiff States' motion for a stay of proceedings is hereby denied. This action is dismissed without prejudice for the reasons noted above.

IT IS FURTHER ORDERED that the Clerk of Court hereby terminate this action in the records.

DONE and DATED this 3rd day of February, 1993.

/s/ Jack D. Shanstrom
United States District Judge

United States General Accounting Office
GAO Report to Congressional Requesters

January 1992

WATER RESOURCES

Corps' Management of Ongoing Drought in the Missouri River Basin

[SEAL] [BAR CODE]
145772

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GAO/RCED-92-4

GAO United States
General Accounting Office
Washington, D.C. 20548

Resources, Community, and
Economic Development Division

B-241794

January 27, 1992

The Honorable Kent Conrad
Vice Chairman, Subcommittee on Water
and Power
Committee on Energy and Natural Resources
United States Senate

The Honorable Byron L. Dorgan
House of Representatives

As you requested, we reviewed the U.S. Army Corps of Engineers' management of the Missouri

River reservoir system under drought conditions in 1988, 1989, and 1990. Specifically, the report examines whether the Corps followed a drought contingency plan and identifies how the Corps set operating priorities for this plan.

As agreed with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 15 days from the date of this letter. At that time, we will send copies to interested parties and make copies available to others upon request.

This report was prepared under the direction of James Duffus III, Director, Natural Resources Management Issues, who may be reached on (202) 275-7756. Other major contributions are listed in appendix I.

/s/ J. Dexter Peach
J. Dexter Peach
Assistant Comptroller General

Executive Summary

Purpose

The Missouri River basin, encompassing all of Nebraska and parts of nine other North Central states, is experiencing its most severe drought since the 1930s. Below-normal rain and snowfall have left the water at three U.S. Army Corps of Engineers reservoirs on the upper Missouri River at levels significantly below normal. Concerned about the drought's impacts on the recreation industries supported by the reservoirs in Montana and the Dakotas, state officials questioned whether the Corps had a

drought contingency plan to conserve water in the reservoirs and equitably distribute the negative economic impacts of the drought.

The Vice Chairman, Subcommittee on Water and Power, Senate Committee on Energy and Natural Resources, and Representative Byron L. Dorgan asked GAO to (1) review whether in 1988, 1989, and 1990 the Corps followed a drought contingency plan and whether the plan reduced the amount of water released, and (2) identify how the Corps set operating priorities for this plan.

Background

The Corps operates six dams on the Missouri River – located above Sioux City, Iowa – as an integrated system. Water in the reservoirs makes possible commercial navigation between Sioux City and St. Louis, Missouri; generates hydroelectric power; provides municipal and industrial water supplies; and supports recreation industries in Montana, North Dakota, and South Dakota. The Corps manages the system according to its master Manual and operating priorities established in 1952. The Corps can fulfill all purposes of the Missouri River reservoir system under normal operating conditions. However, since 1988, the drought has prevented the Corps from meeting all users' demands for water. Competition for the available water supply has increased, particularly between recreation interests in the upper basin and navigation interests in the lower basin below the reservoirs.

Results in Brief

The Corps followed a drought contingency plan in 1988, 1989, and 1990 in releasing water from the reservoir system. Acting consistently with the plan, the Corps reduced winter release rates, shortened navigation seasons on the Missouri River, and reduced water levels in the navigation channel. As a result, 17 percent less water was released during the 3-year period than would have been released under normal operating conditions. The drought and the Corps' response to it adversely impacted all of the purposes served by the reservoirs except flood control.

The Corps' drought contingency plan, however, is based on assumptions about the amount of water needed for navigation and irrigation made in 1944 that are no longer valid, and the plan does not reflect the current economic conditions in the Missouri River basin. The Corps' ongoing comprehensive study of its operation of the reservoir system is expected to address these issues. Notwithstanding the results of its study, the Corps maintains on the basis of its interpretation of the authorizing legislation that unless it obtains congressional approval to change existing operating priorities, it must continue to give recreation a lower operating priority than other authorized purposes even if this lower priority results in decreased system benefits. GAO sees no appropriate

basis for the Corps' view. A lawsuit filed in federal court by three upper-basin states questions the legality of the Corps' position on recreation.

Principal Findings

Corps Followed a Drought Contingency Plan in 1988, 1989, and 1990

Declining water reserves in the Missouri River system triggered the Corps' drought contingency plan in July 1988. Following the plan, the Corps maintained normal water releases during a shortenened 1988 navigation season to offset the lower-than-normal runoff into the river downstream of the reservoirs. The Corps then reduced water releases during the 1988-89 and 1989-90 winters, shortened the 1989 and 1990 navigation seasons, and reduced the 1989 and 1990 navigation streamflows.

GAO estimated that if the Corps had not reduced its service to navigation and hydroelectric power for the 1988-1990 drought period, it would have released about 61.2 million acre-feet of water. Corps records show that the volume released was about 50.8 million acre-feet, or 17 percent less than under normal operations. As of December 31, 1990, drought operations had used about 42 percent of the water normally held in reserve for use during a drought. The Chief of the Corps' Reservoir Control Center in Omaha, Nebraska, estimated that

	as of September 1991, the reservoirs needed 4 to 6 years of normal runoff to return to normal operating levels.
Drought Has Impacted All Purposes Except Flood Control	Data obtained from the Corps, state officials, industry representatives, and private individuals indicated various drought impacts. Municipal, industrial, and rural water supplies above and below Sioux City experienced pumping and other problems because of the level of their intakes. Below Sioux City, commodity shipments on the river declined. Above Sioux City, hydroelectric power generation declined, private irrigators lost their water supplies, and receding shorelines left boating facilities at the upper three reservoirs on dry land and reduced the habitat for fish.
Some Corps' Assumptions About Demand for Water Are No Longer Valid	According to the Corps, the Congress approved the Missouri River reservoir system in 1944 to improve the basin's economic climate. At that time, the system's planners believed that they could achieve this by providing flood control, river transport for the lower basin's products, and irrigation for the upper basin's arid farmlands and by generating power for inhabitants throughout the basin. Conditions supporting these assumptions have changed over time. In 1944, the Corps estimated the demand for river transport of goods at 12 million tons annually. At commercial navigation's peak in 1977, 3.3

million tons of goods were shipped on the Missouri, or 72 percent less than the Corps' estimate. As of 1988, the tonnage shipped on the river had declined further, to 2.2 million tons. In addition, the federal government never constructed the massive irrigation projects anticipated in 1944 that would have used the reservoirs' water to irrigate 2.2 million acres of farmland. Conversely, the extent to which the reservoirs have generated recreation industries that provide significant economic benefits to their host states was not envisioned by the system's planners.

The Corps is reviewing its operation of the Missouri River reservoir system because information in the Master Manual is outdated and because users of the system have questioned the Corps' management of it. The Corps will analyze the national economic development benefits that can be derived from the reservoir system under various operating alternatives and plans to complete its review in early 1993.

Current Lawsuit Questions the Corps' Operating Priorities

On the basis of its interpretation of section 9 of the Flood Control Act of 1944, which authorized construction of the Missouri River system, the Corps believes that each authorized purpose is either primary or secondary. The Corps also believes that secondary purposes, which it

says includes recreation, must be relegated to a lower operating priority than primary purposes. As a result, according to the Corps, recreational use of the reservoirs was not a factor in the Corps' major water release decisions during the drought. Corps officials said they would not give priority to recreation over other purposes even if their analysis showed that the change in priority could increase total system benefits because of the Corps' position on primary and secondary purposes. They said that congressional approval would be needed to change existing operating priorities.

In February 1991, three upper basin states – Montana, North Dakota, and South Dakota – filed a lawsuit in federal court challenging the Corps' policy of categorizing a project's authorized purposes as primary and secondary. The outcome of this court case could have far-reaching implications because the Corps' policy is applicable agencywide. In essence, the states argue that because recreation is an authorized purpose of the Missouri River system, it is not a secondary purpose that receives only water that is left over after other uses are satisfied.

Because its review did not reveal a statutory scheme for regarding authorized purposes as primary or

secondary, GAO sees no appropriate basis for the Corps' view. The lawsuit may ultimately settle the legal question. However, in the absence of a court decision adverse to the Corps' position, the Corps will continue to relegate recreation to a low priority, even if the lower priority results in decreased system benefits, unless it is directed by the Congress to establish operating priorities for all authorized purposes on the basis of economic and other benefits to be derived from all authorized purposes.

Matter for Congressional Consideration

To ensure that the Corps maximizes the economic and other benefits of all authorized purposes of the Missouri River reservoir system and other Corps water projects, the Congress should consider enacting legislation to require the Corps to establish operating priorities for its reservoir projects on the basis of the economic, environmental, social, and other benefits to be derived from all authorized project purposes.

Agency Comments

GAO discussed the information in this report with officials at the Corps' headquarters and Missouri River Division. In general, the officials agreed that the information was accurate, and GAO incorporated suggested changes where appropriate. However, these officials disagreed with GAO's view that the Corps can

change the operating priority for recreation without congressional approval. GAO is suggesting that the Congress consider enacting legislation to clarify this matter. As requested, GAO did not obtain written agency comments on a draft of this report.

[LOGO]

US Army Corps of Engineers

Northwestern Division
Missouri River Basin
Water Management Division

[Map Omitted In Printing]

Missouri River Main Stem Reservoirs
Summary of actual 2000-2001 Operations

February 2002

TABLE IX
GROSS POWER SYSTEM GENERATION
(August 2000 through July 2001)

	Energy Generation 1,000 kWh	Peak Hour kWkW	Generation Date
Corps Powerplants – Main Stem			
Fort Peck	815,723	194,000	8/24/00
Garrison	1,655,956	450,000	9/1&4/00
Oahe	1,797,314	679,000	8/9/00
Big Bend	694,271	480,000	8/30/00
Fort Randall	1,333,746	343,000	6/30/01
Gavins Point	661,895	117,000	9&10/00
Subtotal	6,958,905	2,073,000	8/11/00
USBR Powerplants			
Canyon Ferry	247,977	50,000	8&10/00
Yellowtail*	287,051	93,000	7/01
USBR Subtotal	535,028		
FEDERAL SYSTEM TOTAL	7,493,933		

*Includes one half of total Yellowtail generation which is marketed by Eastern Division.

The tabulations in ***Tables X*** and ***XI*** summarize the total gross generation and power operations for the Eastern Division, P-S MBP, marketing area system for the past operating year. Actual settlement figures at the end of the billing periods differ somewhat from the calendar month figures shown.

Energy production in 2001 will only be 60 percent of normal due to low system releases from Gavins Point and the continued drought in the upper basin that has reduced generation at Fort Peck and Garrison.

6. **Fish Management**. Walleye harvest on Lake Sakakawea was again high in 2001. High numbers of northern pike, white bass, and smallmouth bass were also caught. Very good salmon fishing was noted in the lower portion of the lake.

* * *

Rainbow smelt are the primary forage species in both Lake Sakakawea and Oahe. Successful rainbow smelt reproduction is highly dependent on stable lake levels. Most eggs are laid in water less than one foot deep and are subject to desiccation through wave action and slight drops in water elevation. Rainbow smelt spawning was again very good in Lake Sakakawea during spring 2001. Early indications are that walleye spawning was also successful.

The walleye fishery continues to be in poor condition in Lake Oahe. Large numbers of small walleye in poor condition dominate the fishery. Poor smelt populations coupled with good walleye recruitment during the past years are thought to be primarily responsible. Regulations providing for liberal daily limits of walleye on Oahe in

2001 resulted in the highest ever documented April-May harvest. Rainbow smelt recruitment in the spring of 2001 was again thought to be poor in spite of stable water levels through the spawning period.

7. **Endangered and Threatened Species**. This is the 16th year of operation since the interior least terns and piping plovers were Federally listed as endangered and threatened species, respectively. Both the least tern and piping plover nest on sparsely vegetated sandbars, islands, and shoreline on the Missouri River. Stream gages have been installed on the Missouri River to monitor stream flows during the nesting season. These gages provide a check, as well as a stage history, throughout the season to help relate the effects of regulation and natural events at intervals along the river. The gagging data must be supplemented with observations of nesting activities and conditions to provide the information that is needed for regulation. A dynamic flow routing model has been developed to closely predict maximum river stages along the river for different combinations of daily discharge and hourly power peaking characteristics.

Beginning in 1999 the Omaha District created a computerized Threatened and Endangered Species Data Management System. Daily updated report data includes nest records, census and productivity data, site descriptions field journals, and messages. This database again provided vital information during the 2001 nesting season and proved to be a valuable tool in aiding release decisions benefiting endangered and threatened birds.

Although the Corps prevented inundation of nests where possible and accomplished habitat creation, fledging continued to be lower than predicted by the U.S. Fish and

Wildlife Service 1990 Biological Opinion until 1998 when fledge ratios exceeded the goal for both species. Predation, habitat degradation, severe weather, nest inundation, recent record runoff, and other factors contributed to the previous disappointing low fledging. The record fledging that occurred for both species in 1998 and the subsequent above average fledge ratios achieved since then can be attributed to the large amount of habitat created by the high flows of 1997. The creation of additional habitat has also allowed greater flexibility in the release levels at the lower two main stem projects.

For 2001, the majority of piping plovers were found on Lake Sakakawea and below Gavins Point Dam. Excellent shoreline habitat existed due to the lower reservoir levels caused by the reduced runoff. A record number of piping plover adults, 1054, were found on the Missouri River System this year. The majority of least terns were found on the Missouri River reaches below Garrison, and Gavins Point Dams.

Table XII shows the population distribution and productivity for terns and plovers for 1989 through 2001. Productivity estimates for these birds on the Missouri River in 2001 include only natural nesting. Adult birds in this table are considered breeders even though they may not have had nesting success. The term "fledglings/pair" means the number of young birds produced per breeding pair. This ratio is an estimate, as the fate of every single fledgling is impossible to obtain.

8. **Recreation and Resource Management**. The Missouri River main stem reservoirs provide outstanding opportunities for boating, fishing, swimming, camping, and other outdoor recreation pursuits. Tourism related to

the lakes is a major economic factor in all the states adjoining the main stem. During 2001, public use at these lakes was 59,665,900 visitor hours, a 2.0 percent decrease from 2000. Visitor attendance at the lake projects for 1999, 2000, and 2001 is shown in ***Table XIII***. ***Figure 12*** displays recreation-related visitor hours at each of the six projects for the years 1954 through 2001. The reporting method was changed from recreation days to visitor hours in 1987, and the reporting period was changed from calendar year to fiscal year in 1989 for all Corps of Engineers projects. All Corps projects, including the main stems, are now reporting visitation using the visitation Estimation Reporting System (VERS).

TABLE XIII
VISITATION IN VISITOR HOURS

MAIN STEM PROJECT	YEAR			PERCENT IN-CREASE OR DE-CREASE
	1999	2000	2001	
Fort Peek	5,250,300	5,946,100	6,206,400	+4.4
Garrison	16,312,100	16,555,900	15,318,200	-7.5
Oahe	15,372,500	14,623,200	14,308,300	-2.2
Big Bend	5,215,300	5,261,800	5,057,400	-3.9
Fort Randall	10,811,200	9,752,300	10,128,400	+3.9
Gavins Point	8,826,800	8,756,400	8,647,200	-1.2
SYSTEM TOTAL	61,788,200	60,895,700	59,665,900	-2.0

Figures computed using the Visitation Estimating Reporting System

* * *

[Figure 12 Missouri River Main Stem Project Visitor Hours 1954 to 2001 Omitted]